No. _____

IN THE
Supreme Court of the United States

WILLIAM WISE MOCK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in applying the categorical approach to determine if a defendant is a career offender, the sentencing court can use a Presentence Investigation Report as a *Shepard* document; and

2. Whether the determination as to whether offenses occurred on separate occasions must be limited to the consideration of *Shepard* documents

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

Petitioner, William Wise Mock, respectfully prays that a writ of certiorari issue to review the published decision of the United States Court of Appeals for the Ninth Circuit, entered on July 6, 2018. (App. 1-5).

OPINIONS AND ORDERS BELOW

A grand jury returned a two-count Indictment charging Mr. Mock with one count of attempted manufacture of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846 and one count of endangering human life while attempting to illegally manufacture a controlled substance, in violation of 21 U.S.C. § 858. The jury returned a verdict of guilty on both counts. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the conviction and sentence.

After this Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Mock filed a motion pursuant to 28 U.S.C. § 2255, arguing that his two prior convictions for Washington third-degree assault did not constitute crimes of violence. The District Court denied the motion and granted a certificate of appealability. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the denial of the motion pursuant to 28 U.S.C. § 2255.

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the District Court's denial of Mr. Mock's motion. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. §4B1.1. Career Offender (pre-2016 version)

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. §4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense),

and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

STATEMENT OF THE CASE

On April 23, 2002, a grand jury returned a two-count Indictment charging Mr. Mock with one count of attempted manufacture of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846 ("Count 1"), and one count of endangering human life while attempting to illegally manufacture a controlled substance, in violation of 21 U.S.C. § 858 ("Count 2"). The case proceeded to trial. On November 5, 2002, the jury returned a verdict of guilty on both counts. On February 6, 2003, the District Court denied his motion for acquittal or in the alternative for a new trial, determined that Mr. Mock was a career offender, and sentenced Mr. Mock to 262 months. A written judgment was entered.

A direct appeal followed in Ninth Cir. Case No. 03-30093. The Court issued a memorandum disposition on January 15, 2004, affirming the conviction and sentence.

On March 2, 2005, Mr. Mock filed a request for re-sentencing, which the District Court construed as a motion pursuant to 28 U.S.C. § 2255. That motion was subsequently amended several times. The District Court ultimately dismissed that motion.

On May 27, 2016, Mr. Mock filed a protective motion pursuant to 28 U.S.C. § 2255. In that motion, Mr. Mock argued that the residual clause contained within U.S.S.G. §4B1.2 was void for vagueness pursuant to *Johnson v. United States*, 135 S.Ct. 2551 (2015). Mr. Mock argued that his prior conviction for Washington third-degree assault did not qualify as a crime of violence. Because the District Court had considered two prior third-degree assault convictions to constitute crimes of violence, Mr. Mock sought relief. This Court granted authorization for the second or successive motion pursuant to 28 U.S.C. § 2255.

On February 17, 2017, the government filed its response in opposition. The government argued that because Mr. Mock had two prior Oregon felony convictions for Manufacture and Delivery of Methamphetamine, he remained a career offender.

On March 16, 2017, Mr. Mock filed his reply. Mr. Mock explained that the government effectively conceded that *Johnson* error infected his sentencing hearing, but argued that the error was not prejudicial based upon the prior Oregon drug convictions. Mr. Mock argued that the *Johnson* error was present because it was not clear which prior convictions resulted in the career-offender determination, and thus the third-degree assault convictions may have formed the basis, in consideration of the residual clause. Mr. Mock argued that once the third-degree assault convictions were set aside, there was only one Oregon drug conviction for career-offender purposes, since the two convictions were actually related cases only counting as one

predicate. Mr. Mock also argued that relief was not precluded by *Beckles v. United States*, 136 S.Ct. 2510 (2016), since he was sentenced prior to the decision in *United States v. Booker*, 543 U.S. 220 (2005). Additional supplemental briefing was provided.

On June 23, 2017, the District Court issued an order denying Mr. Mock's motion. After reciting the history of the case and the general framework, the District Court addressed *Beckles*, and concluded that *Beckles* did not bar consideration of Mr. Mock's *Johnson* claim, since he was sentenced pre-*Booker* when the guidelines were still mandatory. The District Court did not find the claims regarding the Oregon drug convictions waived, because that was not relevant until *Johnson* claims became cognizable. The District Court found that it was error to consider Mr. Mock's third-degree assault convictions as predicates. The District Court turned to whether that error was harmless, and noted that the government conceded that there was no intervening arrest between the two Oregon offenses. The District Court pondered whether it could have an evidentiary hearing, but ultimately limited its consideration to the Presentence Investigation Report ("PSR"). The District Court, however, turned to the PSR and reviewed the facts contained therein to determine that there was actually an intervening arrest between the two offenses. Based on that factual determination, the District Court found that the offenses were unrelated and thus the convictions were counted separately. Based on this determination, the District Court denied the motion. The District Court granted a certificate of appealability.

On appeal, the Ninth Circuit affirmed the District Court's order denying relief. The Ninth Circuit reviewed Mr. Mock's arguments for plain error. (App. 3). The Ninth Circuit found that there was no "plain" error demonstrated. (App. 3). The Ninth Circuit found that any error did not affect the fairness, integrity or public reputation of the proceedings. (App. 3-4). The Ninth Circuit also found that the District Court did not abuse its discretion in finding that Mr. Mock's two Oregon drug convictions counted as separate convictions. (App. 4-5).

REASONS FOR GRANTING THE WRIT

I. A presentence Investigation Report has never been approved as a *Shepard* document

A. The *Taylor/Shepard* approach

The principle animating the Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990), was the recognition that the 1986 version of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), maintains the legislation's focus on the elements of a prior offense, rather than on the conduct underlying a prior conviction or on the label that a State attaches to a particular conviction. *See id.* at 588-89, 600-01. The Court held that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598. The Court explained that the "generic sense" it identified is defined by the elements of the defendant's prior conviction. *Id.* at 598, 599.

In light of that conclusion, the Court adopted a "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 600; *accord Shepard v. United States*, 544 U.S. 13, 19 (2005) (noting that, in "imposing the categorical approach," section 924(e) "refers to predicate offenses in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes").

This Court next addressed the modified categorical approach in *Shepard v. United States*, 544 U.S. 13 (2005). At issue there was whether the defendant's Massachusetts burglary convictions were generic burglaries under the ACCA. *Id.* at 17. The Massachusetts statute had alternative elements -- some of which mirrored the ACCA generic burglary definition; some of which did not. The statute prohibited unlawful entry into a *building* with intent to commit a crime (which is a generic burglary) and unlawful entry into *cars and boats* with intent to commit a crime (which is not a generic burglary). *See id.* Because the statute had elements of both generic and non-generic burglary, the Supreme Court held that a federal sentencing court could apply the modified categorical approach and look to *Shepard*-authorized documents to determine whether the defendant necessarily admitted elements of the generic offense. *Id.* at 21.

In *Descamps v. United States*, 133 S.Ct. 2276, 2283-84 (2013), the Court confirmed that in the "'narrow range of cases'" involving "divisible" statutes -- that is,

statutes that set forth "multiple, alternative versions of the crime" -- courts may "examine a limited class of documents to determine which of [the] statute's alternative elements formed the basis of the defendant's prior conviction." The *Shepard* documents approved for consideration in the modified categorical approach are the "indictment, jury instructions, plea colloquy and plea agreement." *Id* at 2285, fn. 2. This Court has expanded the judicially noticeable *Shepard* documents to include items such as a clerk's minute order (*see United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008)) and a docket sheet (*United States v. Strickland*, 601 F.3d 963 (9th Cir. 2010)(*en banc*)).

B. A PSR has never been approved as a *Shepard* document under any circumstances

In *Taylor v. United States*, 495 U.S. 575, 577–79 (1990), the defendant challenged the sentencing court's determination that two of his predicate offenses for burglary under Missouri law constituted "violent felonies" for purposes of the ACCA. Taylor argued that he would have committed a "violent felony" for purposes of the ACCA only if he had committed "generic burglary" of a building or dwelling. The Missouri statute, however, criminalized a significantly broader range of activity, including the "non-generic" burglarizing of boats, tents, and other non-buildings. *Id.* at 599.

The question before this Court was "whether the sentencing court in applying § 924(e) must look only to the statutory definitions of the prior offenses, or whether the court may consider other evidence concerning the defendant's prior crimes." *Id.* at 600. The Court rejected an approach that required the sentencing court "to engage in an elaborate fact finding process regarding the defendant's prior offenses," *id.* at 601, and instead held that, in determining whether a prior conviction was for a "violent felony" under the ACCA, a sentencing court should look only to: (1) the fact of conviction; (2) the statutory definition of the prior offense; and, in cases where the defendant was convicted by a jury, to (3) the criminal indictment or information, together with (4) the jury instructions. *Id.* at 602.

In, *Shepard v. United States*, the Court was faced with the question of how to apply *Taylor* when the predicate offenses for sentencing under the ACCA stemmed from a guilty plea rather than a jury verdict. 544 U.S. 13, 19 (2005). The predicate offenses at issue there, as in *Taylor*, were for burglary in a state where the burglary statute encompassed both "generic" and "nongeneric" burglary, and the sentencing court was required to determine if Shepard's burglary convictions were "violent felon[ies]" under the ACCA. *Id.* at 15–16. In particular, the *Shepard* Court addressed whether a sentencing court could look to police reports or complaint applications in determining whether Shepard's guilty pleas for burglary had been based upon conduct

that would constitute "generic burglary," in which case they could be properly considered as ACCA predicate offenses. *Id.* at 16.

The *Shepard* Court first held, as a threshold matter, that "guilty pleas may establish ACCA predicate offenses." *Id.* at 19. It then concluded that "a later court determining the character of an admitted burglary [for purposes of sentencing under the ACCA] is generally limited to examining 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. This was based upon the same "pragmatic" concerns expressed in *Taylor*, namely, a sentencing court's need to identify ACCA predicate offenses while "avoid[ing] subsequent evidentiary enquiries into the factual basis for the earlier conviction." *Id.* at 20.

Justice Souter, writing for a plurality of the *Shepard* Court, also placed the decision within the line of cases preceding *Shepard* that greatly diminished the scope of a court's fact finding authority at sentencing. *Id.* at 24. He noted that the Court's opinion in *Taylor* "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." *Shepard*, 544 U.S. at 24 (referring to the rule announced by *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). The Court explicitly excluded from this limitation the fact of a

defendant's prior conviction, pursuant to its earlier decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). More recently, in *Alleyne v. United States*, the Court held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 570 U.S. 99 (2013).

Although *Taylor* and *Shepard* involved the question of whether predicate offenses under the ACCA were "violent felonies," the reasoning underlying those decisions applies with equal force to the analysis of whether the offenses were committed "on occasions different from one another." 18 U.S.C. § 924(e)(1).

First, as a matter of statutory interpretation, there is nothing in the statute's construction to suggest that Congress intended to limit the "violent felony" inquiry for predicate offenses, but *not* to limit a court's inquiry with respect to whether offenses were committed on "occasions different from one another." Nor is there any indication by the Court in *Shepard* that its conclusion was informed by a unique characteristic of the "violent felony" analysis that would not apply to the parallel "on occasions different from one another" inquiry.

Furthermore, the majority in *Shepard* reiterated its commitment, first expressed in *Taylor*, to "respect[ ] Congress's adoption of a categorical criterion that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction." 544 U.S. at 20. The Court in *Taylor* explicitly determined that, in enacting the ACCA,

Congress had not meant "to adopt an approach that would require the sentencing court to engage in an elaborate fact finding process regarding the defendant's prior offenses." 495 U.S. at 601. Indeed, "the *Shepard* Court was apparently concerned about the prospect of a sentencing court making *any* factual finding not necessarily implied by the prior conviction—irrespective of how clearly the factual finding was established." *United States v. Rosa*, 507 F.3d 142, 153 (2d Cir.2007). The *Shepard* Court explicitly rejected the Government's desire for a "wider evidentiary cast" that would include police reports and "documents submitted to lower courts even prior to charges." 544 U.S. at 21.

The same concerns expressed by the Court in *Shepard* with regard to "violent felonies" are implicated when the inquiry concerns the separateness of the predicate crimes. Indeed, these concerns are perhaps even more salient here because the facts relied upon in determining whether offenses are committed on "different occasions"—the date, time, victim identity, or location of the offense—are rarely elements required for conviction, and hence, might not be included in jury instructions or placed before the court (much less admitted by a defendant) during a plea colloquy. Absent reliance on *Taylor*- or *Shepard*-approved sources, such as a charging paper, jury instruction, or plea colloquy, a sentencing judge would necessarily have to reconstruct the conduct underlying a conviction, which might require in-depth examination of the trial record for each predicate offense, or a similarly broad

evidentiary inquiry that *Taylor* and *Shepard* have decidedly foreclosed. *See, e.g., Taylor,* 495 U.S. at 601.

Additionally, limiting the separate conviction analysis to *Taylor* and *Shepard* materials avoids potential constitutional problems associated with affording broad fact-finding powers to a sentencing court in evaluating ACCA predicate offenses. In *Shepard,* the plurality noted:

> [T]he dispute raises the concern underlying *Jones* and *Apprendi:* the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence.... The rule of reading statutes to avoid serious risks of unconstitutionality therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implication of a jury's verdict.

544 U.S. at 25–26 (internal citation omitted).

The Second Circuit has explicitly held that the decision as to whether convictions occurred on separate occasions "may also be answered by looking only to *Shepard*-approved materials." *United States v. Dantzler*, 771 F.3d 137, 145 (9th Cir. 2014). *See also United States v. Santiago*, 268 F.3d 151, 153 (2d Cir. 2001). Other circuits have reached the same conclusion. *See, e.g., United States v. King*, 853 F.3d 2767 (6th Cir. 2017); *Kirkland v. United States*, 687 F.3d 878, 886 & n.9 (7th Cir. 2012); *United States v. Boykin*, 669 F.3d 467, 472 (4th Cir. 2012); *United States v. Sneed*, 600 F.3d 1326, 1332

(11th Cir. 2010); *United States v. Thomas*, 572 F.3d 945, 950 (D.C. Cir. 2009); *United States v. Fuller*, 453 F.3d 274, 279 (5th Cir. 2006); *United States v. Harris*, 447 F.3d 1300, 1305 (10th Cir. 2006); *274 *United States v. Taylor*, 413 F.3d 1146, 1157 (10th Cir. 2005).

Ninth Circuit precedent is clear that a district court may not rely on a PSR as a *Shepard* document, with or without an objection thereto. *See, e.g., United States v. Corona–Sanchez*, 291 F.3d 1201, 1212, 1214 (9th Cir.2002) (*en banc*) ("A presentence report reciting the facts of the crime is insufficient evidence to establish that the defendant pled guilty to the elements of the generic definition of a crime when the statute of conviction is broader than the generic definition," even though the defendant "did not object to the PSR's recitation.") (*citing United States v. Franklin*, 235 F.3d 1165, 1172 (9th Cir.2000); *United States v. Potter*, 895 F.2d 1231, 1237–38 (9th Cir.1990)); *United States v. Gonzalez–Aparicio*, 663 F.3d 419, 432–33 (9th Cir. 2011) (observing that "a sentencing court may not turn to the PSR for a narrative description of the underlying facts of the prior conviction," notwithstanding that the defense made no objections to the PSR); *see also United States v. Chavaria–Angel*, 323 F.3d 1172, 1176 (9th Cir.2003) (observing that "in this circuit, district courts may not rely exclusively on ... the pre-sentence report as evidence of a prior conviction"). Indeed, we have held on multiple occasions that a district court commits plain error when it "relie[s] solely on the facts recited in the PSR." *United States v. Rendon–Duarte*, 490 F.3d 1142, 1146 (9th Cir.2007); *United States v. Pimentel–Flores*, 339 F.3d 959, 968

(9th Cir.2003). *See also, e.g., United States v. Castillo-Marin*, 684 F.3d 914(9th Cir. 2012)(finding use of PSR as *Shepard* document to constitute plain error).

II. The Questions Presented Are Recurring and of Nationwide Importance

Ensuring uniform standards is particularly important in this context, where a prior conviction can trigger increased punishment, removal from the United States, or other serious consequences. If the courts of appeals employ different standards to determine when the modified categorical approach applies, similarly situated defendants will face different outcomes with grave results, based merely on their geographic location. The immigration and criminal sentencing contexts implicated by the questions presented are areas of quintessentially national concern where the need for the federal courts to speak with a single voice is paramount. *See, e.g., Chamber of Commerce v. Whiting*, 563 U.S. 582, 634 (2011) (Sotomayor, J., dissenting) (recognizing Congress's intent that immigration laws be enforced "uniformly"). Yet under the fragmented state of the law in the circuits, whether the same offense triggers the grave and frequently life-altering consequences of a "crime of violence" or "violent felony" designation currently turns on the serendipity of what information is included in a PSR. The Court should grant certiorari.

Conclusion

Based on the arguments discussed herein, it is requested that this Court grant this Petition for Writ of Certiorari, reverse the Ninth Circuit's decision affirming the District Court's denial of Mr. Mock's motion, and remand with instructions to conduct further proceedings consistent with this Court's decision.

Dated: October 1, 2018

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