No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAQONE WILLIAMS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

Scott Graham
Counsel of Record for Petitioner
SCOTT GRAHAM PLLC
1911 West Centre Avenue, Suite C
Portage, Michigan 49024-5399
Telephone: 269.327.0585
E-mail: sgraham@scottgrahampllc.com

QUESTION PRESENTED

Whether a sentencing court may consider felony complaints, with unadopted assertions, under *Shepard v. United States*, 544 U.S. 13 (2005), when that court engages in a modified categorical analysis to determine the nature of a prior conviction as a potential career-offender predicate under the U.S. Sentencing Guidelines.

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

SENTENCING GUIDELINES

RULES

PETITION FOR WRIT OF CERTIORARI

Petitioner Daqone Williams requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on January 31, 2019, affirming the judgment of the United States District Court for the Western District of Michigan, Southern Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not recommended for full-text publication and appears at *United States v. Williams*, No. 18-1375, 2019 U.S. App. LEXIS 3185 (6th Cir. Jan. 31, 2019). It is also attached at **Appendix A**.

The judgment of the United States District Court for the Western District of Michigan, Southern Division, is unpublished and is attached at **Appendix B**. The district court's findings on this matter, also unpublished, appear in the records attached at **Appendix C**.

JURISDICTION

The United States Court of Appeals decided this case on January 31, 2019. Mr. Williams did not seek rehearing or rehearing en banc in the Sixth Circuit. He now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). He has provided notice of this petition to the government, in accordance with this Court's Rule 29.4(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves application of the Sixth Amendment to the United States Constitution, providing that: "In all criminal prosecutions, the accused shall enjoy

the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

This case also involves application of the career-offender sentencing-guideline enhancement found in U.S.S.G. § 4B1.1(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."

STATEMENT OF THE CASE

A. Federal jurisdiction has been proper in this case since this case's inception, and this Court should exercise jurisdiction under Rule 10(a) to correct the Sixth Circuit's extreme departure from this Court's jurisprudence, namely this Court's instructions articulated in Shepard v. United States.

In accordance with this Honorable Court's Rules 14(1)(g)(ii) and 10(a), Mr. Williams offers this statement of jurisdiction and suggestion of justification for this Court's consideration of his case. Mr. Williams faced federal criminal charges in the district court under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The district court

entered its judgment on March 29, 2018. RE. 28: Judgment, PageID 150-56. Mr. Williams filed his timely notice of appeal on April 2, 2018. RE. 30: Notice of Appeal, PageID 160. The Sixth Circuit exercised jurisdiction over Mr. Williams's appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of sentences.

Mr. Williams now asks this Honorable Court to consider the Sixth Circuit's marked departure from this Court's jurisprudence in *Shepard v. United States*, 544 U.S. 13 (2005), and its progeny, namely the Sixth Circuit's decision to countenance a sentencing court's unqualified consideration of a felony complaint, as part of the modified categorical approach to analyzing prior convictions as potential career-offender predicates for purposes of applying U.S. Sentencing Guideline § 4B1.1. *See* S. Ct. R. 10(c).

B. Mr. Williams's case presents a straight-forward factual scenario and procedural history.

Mr. Williams once described his life as having grown "tiresome" because of his poor choices, choices which have led to legal transgressions and personal failures like missing his twin sons' first birthdays. *See* RE. 25: Final PSIR, PageID 110, ¶¶ 30-31. Mr. Williams turned thirty-one during the pendency of his appeal. RE. 25: Final PSIR, PageID 119, ¶ 67. He now desperately recognizes the need for more mature decision making in his life and has re-envisioned his goals. He has started to come to grips with his own life, which started out with a teenaged mother and the struggles of poverty and want, domestic violence, and maternal physical ailments that undermined Mr. Williams's mother's ability to care for her children. *See* RE. 25: Final

PSIR, PageID 119, ¶¶ 67-68. Mr. Williams's mother currently receives disability payments because she battles bipolar disorder. RE. 25: Final PSIR, PageID 119, ¶ 68.

At times, the family battled homelessness, and Mr. Williams and one of his brothers went into foster care on multiple occasions. RE. 25: Final PSIR, PageID 120, ¶ 70. Mr. Williams's mother fought to get her children back, but these childhood experiences were traumatic for Mr. Williams. *See* RE. 25: Final PSIR, PageID 120, ¶ 70. Most of Mr. Williams's childhood was spent in Benton Harbor, Michigan. RE. 25: Final PSIR, PageID 120, ¶ 70. When Mr. Williams was a teenager, his mother succeeded in moving the family to Niles, Michigan, to escape the negative social influences of Benton Harbor. RE. 25: Final PSIR, PageID 120, ¶ 71. For many years, Mr. Williams called Niles home. RE. 25: Final PSIR, PageID 120, ¶ 71. And despite the struggles of his childhood, he has maintained a strong relationship with his mother, and he enjoyed daily contact with her before he was taken into custody for the instant offense. RE. 25: Final PSIR, PageID 119, ¶ 68.

Mr. Williams's current situation arose when he began distributing crack cocaine and heroin in 2017. *See* RE. 1: Indictment, PageID 1-6. A confidential informant told authorities that Mr. Williams was selling crack cocaine. RE. 25: Final PSIR, PageID 107, ¶ 11. An undercover agent made controlled buys from Mr. Williams. RE. 25: Final PSIR, PageID 107, ¶¶ 12-14. On May 23, 2017, authorities obtained and executed a search warrant for Mr. Williams's home and seized controlled substances in the course of the search. RE. 25: Final PSIR, PageID 108, ¶ 18.

The government indicted Mr. Williams on July 11, 2017, charging him with six counts of controlled-substance offenses. RE. 1: Indictment, PageID 1-6. Authorities arrested Mr. Williams on August 7, 2017, and he had his first appearance before the district court on that day. RE. 4: Minutes of Initial Appearance, PageID 11. The court ordered Mr. Williams released on an unsecured appearance bond. RE. 5: Appearance Bond, PageID 12-15. The district court arraigned Mr. Williams and conducted an initial pretrial conference on August 10, 2017. RE. 10: Minutes of Arraignment, PageID 23.

Mr. Williams entered a guilty plea, without a written plea agreement, on November 2, 2017. RE. 28: Minutes of Plea, PageID 33. The probation office filed its final presentence investigation report (PSIR) on March 16, 2018. RE. 25: Final PSIR, PageID 103-29. In the course of the sentencing process, and critical for purposes of this petition, Mr. Williams objected to being scored as a career offender under the advisory guidelines. RE. 25: Final PSIR, PageID 127; RE. 26: Def. Sent. Memo., PageID 130. Mr. Williams faced a mandatory minimum sentence of five years on one of the counts of conviction. RE. 25: Final PSIR, PageID 129; RE. 32: Plea Trans., 11/2/17, PageID 176. On March 28, 2018, the district court imposed a sentence of 140 months of imprisonment, 4 years of supervised release, and a $600 special assessment. RE. 27: Minutes of Sentencing, PageID 149.

At the sentencing hearing, the district court considered Mr. Williams's objections to application of the career-offender sentencing guidelines. RE. 33: Sent. Trans., 3/28/18, PageID 203. The court overruled these objections, but it did grant a

downward variance from the career-offender guideline range. RE. 33: Sent. Trans., 3/28/18, PageID 221. The court followed the guideline calculations in the PSIR and found an offense level of 31, a criminal-history category of VI, and an advisory range of 188 to 235 months. RE. 33: Sent. Trans., 3/28/18, PageID 218. In imposing the 140-month sentence, the court granted that downward variance. RE. 33: Sent. Trans., 3/28/18, PageID 221.

The district court entered its judgment on March 29, 2018. RE. 28: Judgment, PageID 150-56. Mr. Williams filed his timely notice of appeal on April 2, 2018. RE. 30: Notice of Appeal, PageID 160. Mr. Williams appealed, to the Sixth Circuit, the district court's assessment of him as a career offender for purposes of applying § 4B1.1 of the U.S. Sentencing Guidelines, and the substantive reasonableness of his sentence.

C. The Sixth Circuit's consideration of this matter seriously undermined this Court's jurisprudence stemming from Shepard v. United States, 544 U.S. 13 (2005).

In his appeal to the Sixth Circuit Court of Appeals, Mr. Williams raised two issues, one of which gives rise to this petition. Mr. Williams challenged the substantive reasonableness of his sentence, and he questioned the appropriateness of using two of his prior convictions as career-offender predicates for purposes of enhancing his sentencing guidelines under U.S.S.G. § 4B1.1—essentially calling into question the procedural reasonableness of his sentence because the statute under which he sustained those prior convictions was overbroad, and the *Shepard* documents offered by the government did not clarify the elements underlying the

prior convictions. *See United States v. Williams*, No. 18-1375, 2019 U.S. App. LEXIS 3185, at *2, *9 (6th Cir. Jan. 31, 2019).

Continuing the arguments he had presented to the district court, Mr. Williams argued that the statute under which he sustained his two prior marijuana convictions that stood at the center of the analysis—namely M.C.L. § 333.7401—was overbroad and that the *Shepard* documents provided by the government failed to remedy this overbreadth and establish qualifying prior convictions. *See Williams*, No. 18-1375, Brief for Appellant, PageID 15-16. The Sixth Circuit, however, missed key aspects of Mr. Williams's argument and misapplied this Court's guidance, as articulated in *Shepard* and its progeny.

First, the Sixth Circuit ignored the fact that the *Shepard* documents failed to establish the actual elements and subsections of § 333.7401 that gave rise to the convictions. The court assumed subsection § 333.7401(2)(d)(iii), despite the fact Mr. Williams had pointed out that *Shepard* documents did not establish the nature of the prior convictions or the elements of those offenses. *See Williams*, No. 18-1375, 2019 U.S. App. LEXIS 3185, at *2; *Williams*, No. 18-1375, Brief for Appellant, PageID 15-16; *United States v. Williams*, No. 1:17-CR-140 (W.D. Mich. Mar. 21, 2018) (RE. 26: Def. Sent. Memo., PageID 130-33). Second, the appellate court turned to, and approved use of, documents explicitly rendered unreviewable under *Shepard*. The court reviewed "Both Felony Complaints and Felony Informations" during its analysis. *See Williams*, No. 18-1375, 2019 U.S. App. LEXIS 3185, at *5.

The Sixth Circuit acknowledged Mr. Williams's argument "that the district court improperly relied on the charging documents because he did not admit to or adopt the allegations in the Felony Complaints." *Williams*, No. 18-1375, 2019 U.S. App. LEXIS 3185, at *6-*7. It answered that argument by saying that it has "repeatedly stated" that courts may look to charging documents, written plea agreements, transcripts of plea colloquies, and any explicit factual findings by trial judges to which defendants assent. *See id.* at *7. Unfortunately, the court ignored this Court's explicit declaration in *Shepard* that courts may *not* consider complaint applications when engaging in the modified categorical approach to prior-conviction analysis. *See Shepard*, 544 U.S. at 16.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT CERTIORARI IN MR. WILLIAMS'S CASE TO AFFIRM THAT SENTENCING COURTS MAY NOT CONSIDER FELONY COMPLAINTS, WITH UNADOPTED ASSERTIONS, UNDER *SHEPARD V. UNITED STATES*, 544 U.S. 13 (2005), WHEN ENGAGING IN MODIFIED CATEGORICAL ANALYSIS RELATED TO PRIOR CONVICTIONS AS POTENTIAL CAREER-OFFENDER PREDICATES UNDER THE U.S. SENTENCING GUIDELINES.

Under U.S. Sentencing Guideline § 4B1.1, a person qualifies for a significant increase in their advisory sentencing guidelines range if they qualify as a "career offender"—if they were at least eighteen years old at the time of the instant offense, the instant offense qualifies as a felony "crime of violence" or "controlled-substance offense," and the person has at least two prior felony convictions for crimes of violence or controlled-substance offenses or both. *See* U.S.S.G. § 4B1.1(a). In deciding whether a prior offense qualifies as a "crime of violence" or "controlled-substance offense,"

courts may, in certain circumstances, engage in what this Court has called the "modified categorical approach" and review certain judicial documents from the record of the prior conviction at issue. *Shepard v. United States*, 544 U.S. 13, 16 (2005).

Mr. Williams's case requires no complicated analysis: This Court, in *Shepard*, said that courts may not consider complaint applications when engaging in the modified categorical approach to determine the nature of a prior conviction for purposes of applying a sentencing enhancement. *See id.* Yet the Sixth Circuit approved unqualified consideration of felony complaints in Mr. Williams's case. *United States v. Williams*, No. 18-1375, 2019 U.S. App. LEXIS 3185, at *5-*7 (6th Cir. Jan. 31, 2019). Called upon to analyze two prior convictions Mr. Williams had sustained under Michigan's M.C.L. § 333.7401, the court looked to materials in the subject complaints to determine the subsection of conviction and other details allegedly related to Mr. Williams's prior offenses. *See id.* at *6. The Sixth Circuit turned to these complaints despite the fact that felony informations existed for both prior convictions. *See United States v. Williams*, No. 1:17-CR-140 (W.D. Mich. Mar. 21, 2018) (RE. 23-1: Gov. Resp. to Def. Objections, Attachment, PageID 75, 78).

In *Shepard*, this Court presented the framework for determining whether a prior conviction qualifies as a violent felony for Armed Career Criminal Act (ACCA) purposes. *Shepard*, 544 U.S. at 15-16. The Court circumscribed the analysis, allowing consideration of only documents bearing a certain judicial imprimatur: charging documents, the terms of a plea agreement or transcript of colloquy between judge and

defendant (in which the defendant confirmed the factual basis for the plea), or "some comparable judicial record of this information." *Id.* at 26. These limits on consideration of prior judicial records cabin judicial fact finding and contribute to protection of a defendant's Sixth Amendment right to a jury finding of facts that raise a sentence. *Id.* at 25; *see also Descamps v. United States*, 570 U.S. 254, 267, 269 (2013).

Since *Shepard*, courts have applied the *Shepard* framework to the career-offender context under the U.S. Sentencing Guidelines and U.S.S.G. §§ 4B1.1 and 4B1.2. *See, e.g.*, *United States v. Cooper*, 739 F.3d 873, 878 (6th Cir. 2014). The circuits have recognized the evolution of the categorical approach from *Taylor v. United States*, 495 U.S. 575 (1990), through *Shepard*, through *Descamps*, and beyond, and they have applied it in the career-offender context. *See id.* 878, 880 n.2. They recognize that the analysis requires them to limit their inquiries to facts defendants necessarily admitted in entering their guilty pleas. *See Cooper*, 739 at 881, 883. And they recognize that facts recited in a presentence investigation report do not qualify for consideration. *See id.* "The key," this Court has "emphasized, is elements, not facts." *Descamps*, 570 U.S. at 261. At least for ACCA purposes, a conviction based on a guilty plea can only qualify as a predicate offense if the defendant necessarily admitted all the elements of the generic offense. *Id.* at 262.

As this Court has "always understood it," the modified categorical approach aims "to identify, from among several alternatives, the crime of conviction so that the [sentencing] court can compare it to the generic offense." *Id.* at 264. The approach can

prove daunting, and even with the approved *Shepard* documents, it may involve aged, misleading, or even "downright wrong" documents. *See id.* at 270. Yet it must "enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime." *Id.* 272.

A. This Court has rejected the unqualified use of non-judicial documents, like Michigan criminal complaints, during the modified categorical approach to analyzing prior convictions as potential career-offender predicates.

This Court has consistently rejected the idea of using, without qualification, complaints as *Shepard* documents, and the circuit courts have followed suit, including the Sixth Circuit. *See, e.g.*, *Shepard*, 544 U.S. at 16 (rejecting complaint applications); *see also United States v. King*, 853 F.3d 267, 278 (6th Cir. 2017) (courts "may rely on facts in a complaint—if those facts were later admitted by the defendant"); *United States v. Wright*, 567 F. App`x 564, 568-69 (10th Cir. 2014) (allowing consideration of Minnesota complaints because complaint constituted the sole charging record in Minnesota, and the document contained a prosecutor's signature as well as the police officer's and a judge's findings of probable cause, and Minnesota law required inclusion of certain charge details). In ruling as it did in Mr. Williams's case, the Sixth Circuit violated its own rules as well as this Court's precedent.

As Justice Alito has admonished, charging documents as a whole are not without their shortcomings in the *Shepard*-document equation. *See Descamps*, 570 U.S. at 293 (Alito, J., dissenting). For example, "the mere fact that state law requires a particular fact to be alleged in a charging document does not mean that this fact

must be found by a jury or admitted by the defendant." *Id.* In his dissenting analysis in *Descamps*, Justice Alito carefully cited *both* the complaint and the information from the case. *See id.* at 294. In *Moncrieffe v. Holder*, 569 U.S. 184, 192 (2013), this Court turned, with care, to the subject plea agreement. In *Chambers v. United States*, 555 U.S. 122, 126 (2009), which involved a failure-to-report-for-imprisonment conviction, the Court looked to the state-court information. In *Taylor* itself, the Court pointed to indictments, informations, and jury instructions as sources for review. *Taylor*, 495 U.S. at 602.

This Court has spoken of "formal charging documents." *See Carachuri-Rosendo v. Holder*, 560 U.S. 563, 577 n.12 (2010) (*citing United States v. Rodriquez*, 553 U.S. 377, 389 (2008)). A "formal charging document" will "fall within the limited list of generally available documents that courts already consult for the purpose of determining if a past conviction qualifies as an ACCA predicate." *Rodriquez*, 553 U.S. at 389. As explored below, Michigan criminal complaints can and do fall short of *formal* charging documents.

Going back to the foundation of the inquiry and *Taylor*, this Court recognized the shortcomings of consulting any charging documents. "In some cases," the *Taylor* Court recognized, "the indictment or other charging paper might reveal the theory or theories of the case presented to the jury. In other cases, however, only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic burglary." *Taylor*, 495 U.S. at 601. Charging documents as a whole can, and often do, fail to reveal the nature of the prior conduct. The

unverified/untested nature of a criminal complaint, as opposed to an indictment that has passed through at least some crucible in the form of a grand jury, presents even greater shortcomings.

To require more than the unqualified adoption of allegations in complaints to prove the elements of a prior conviction would not demand excessive effort from the government or impose an unrealistic burden. As Justice Alito pointed out in his dissent in *Descamps*, most cases end in guilty pleas, and judges who accept guilty pleas typically require confirmation of a factual basis for the plea, which "will generally focus exclusively on one of the alternative elements" if a statute carries alternative elements. *Descamps*, 570 U.S. at 290 (Alito, J., dissenting). If the government wishes to seek a sentencing enhancement based on a prior conviction under a divisible statute, it can and should find *Shepard* documents to prove that conviction qualifies. If it has only a complaint to make its case, it has hardly invested the effort necessary to justify an enhancement worth years—even decades—of someone's life.

This Court has drawn the line to favor assurances. For example, in the ACCA context of an enhanced sentence establishing a qualifying prior offense, this Court has said that in "cases in which the records that may properly be consulted do not show that the defendant faced the possibility of a recidivist enhancement, it may well be that the Government will be precluded from establishing that a conviction was for a qualifying offense." *Rodriquez*, 553 U.S. at 389. A mere possibility that some future

case "might present difficulties cannot justify a reading of ACCA that disregards the clear meaning of the statutory language." *Id.*

B. Under Michigan law, complaints fail to qualify as Shepard *documents because they fail to offer the necessary judicial safeguards, proceedings, or findings of probable cause to support a charge—they may simply contain accusations by private citizens.*

Michigan offers few protections in the context of criminal complaints. They constitute exactly the kind of "extrajudicial" document the *Shepard* Court rejected in considering sources available for review during modified-categorial-approach analysis: "The Government argues for a wider evidentiary cast, however, going beyond conclusive records made or used in adjudicating guilt and looking to documents submitted to lower courts even prior to charges." *Shepard*, 544 U.S. at 21. This Court rejected that approach: "we cannot have *Taylor* and the Government's position both." *Id.* at 22-23.

In Michigan, a complaint can be said to precede formal charges. If Michigan authorities take a person into custody without a warrant, "a magistrate, upon finding reasonable cause," must issue a warrant or "[e]ndorse upon the complaint a finding of reasonable cause and a direction to take the accused before a magistrate of the judicial district in which the offense is charged to have been committed." M.C.L. § 764.1c(1). The finding of reasonable cause occurs after preparation of the complaint. A complaint need only *possibly* contain "factual allegations establishing reasonable cause." *See* M.C.L. § 764.1d. Michigan's § 764.1d provides only that a "complaint *may*

contain factual allegations establishing reasonable cause." *Id.* (emphasis added). Private individuals may effect arrests and present complaints. M.C.L. § 764.14.

In more formal circumstances, a complaint for an arrest warrant may issue, and an arrest warrant may follow, by electronic means, if a prosecuting attorney authorizes issuance of the warrant; a judge or district-court magistrate orally administers the oath or affirmation to an applicant for an arrest warrant who submits the complaint; and the applicant signs the complaint. M.C.L. § 764.1(3). A magistrate will issue a warrant upon presentation of a "proper complaint" alleging commission of an offense—and a finding of reasonable cause to believe that the individual accused in the complaint committed that offense. M.C.L. § 764.1a(1). A finding of reasonable cause by the magistrate may rest upon: "Factual allegations of the complainant contained in the complaint"; the complainant's sworn testimony; the complainant's affidavit; any supplemental sworn testimony/affidavits of other individuals presented by the complainant or required by the magistrate. M.C.L. § 764.1a(2). A magistrate may require sworn testimony from a complainant (or others). M.C.L. § 764.1a(3). Any "[s]upplemental affidavits may be sworn to before an individual authorized by law to administer oaths." *Id.* Factual allegations contained in a "complaint, testimony, or affidavits may be based upon personal knowledge, information and belief, or both." *Id.*

But unlike with an information or an indictment, no judicial proceeding serves as a safeguard to ensure credibility—some evidentiary basis, some level of cause to believe the target of the complaint has committed a crime. A complaint is, of course,

simply an accusation. *See* M.C.L. § 764.1b ("A warrant issued pursuant to section 1a shall recite the substance of the accusation contained in the complaint."); *see also* M.C.L. § 764.1d ("A complaint shall recite the substance of the accusation against the accused. The complaint may contain factual allegations establishing reasonable cause."). It may contain far more than the facts *necessarily* involved in or supporting the ultimate conviction. *Cf. Shepard*, 544 U.S. at 20-21. As the *Shepard* Court noted, such necessary facts appear in "the details of a generically limited charging document," as opposed to a complaint application. *See id.* at 16, 21. Unlike in Minnesota and *Wright* in the Tenth Circuit, Michigan complaints need not bear a judge's finding of probable cause—and they are not the only means of charging an offense in Michigan. *Cf. Wright*, 567 F. App`x at 568-69.

In Michigan, informations can and do serve as such "generically limited charging documents." *Cf. Shepard*, 544 U.S. at 16, 21. In Michigan, "[a]n information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination." M.C.L. § 767.42. A judicial proceeding, one which would ostensibly establish probable cause, stands between the accused and the charging document, giving that document the standing of an "adequate judicial record" contemplated by the *Taylor* and *Shepard* Courts. *See Shepard*, 544 U.S. at 20, 26.

C. Consistency in application of the modified categorical approach ensures respect for Sixth Amendment rights, judicial efficiency, and a just application of standards.

Courts use the modified categorical approach in a wide range of contexts. This Court has used the approach in considering immigration provisions. *See Moncrieffe*, 569 U.S. at 190 ("When the Government alleges that a state conviction qualifies as an 'aggravated felony' under the INA [Immigration and Nationality Act], we generally employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the INA."); *see also Nijhawan v. Holder*, 557 U.S. 29, 36 (2009) (considering categorical approach in immigration context but ultimately pursuing a circumstance-specific approach). In *Moncrieffe*, this Court explicitly set aside Sixth Amendment concerns: those concerns did not apply in that case's immigration context. *Id.* at 198. In that case, the Court focused only on a potential federal offense in the abstract, explaining, "Our concern is only which facts the CSA [Controlled Substances Act] relies upon to distinguish between felonies and misdemeanors, not which facts must be found by a jury as opposed to a judge, nor who has the burden of proving which facts in a federal prosecution." *Id.*

This Court has described the categorical approach as "practical" and concerned with "fairness." *See, e.g.*, *Moncrieffe*, 569 U.S. at 200-01. It has rejected government suggestions for fact finding as requiring "precisely the sort of *post hoc* investigation into the facts of predicate offenses that we have long deemed undesirable. The categorical approach serves 'practical' purposes: It promotes judicial and

administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact." *Id.*

The categorical/modified-categorical approach has transcended the original Sixth Amendment concerns undergirding it and has taken on its own life as a practical tool for applying otherwise unwieldly statutory provisions related to prior convictions. In *Nijhawan*, the Court distinguished the statutory provisions at issue (flowing from 8 U.S.C. § 1101(a)(43)) from those of the ACCA that gave rise to the categorical approach. *See Nijhawan*, 557 U.S. at 36-38. After comparing the two statutory schemes, the Court concluded that the categorical approach did *not* serve the inquiry related to the relevant subsection of § 1101(a)(43), which involved a circumstance-specific analysis of a person's commission of a fraud offense. *See id.* at 40. The Court specifically considered the modified categorical approach and rejected it in that case, with that statutory provision. *Id.* at 41.

In its cases that, unlike *Nijhawan*, have applied the modified categorical approach, this Court has discussed reviewing "charging documents," but nowhere has it contravened *Shepard*'s prohibition on complaint applications. *See, e.g.*, *Moncrieffe*, 569 U.S. at 191. And in some cases, the Court has not even referred to "charging documents" but instead specified the indictment. In *Nijhawan*, for example, the Court discussed "examining 'the indictment or information and jury instructions,'" (citing *Taylor*) or, when a guilty plea is at issue, "examining the plea agreement, plea colloquy, or 'some comparable judicial record' of the factual basis for the plea" (citing *Shepard*). *Nijhawan*, 557 U.S. at 35.

Backing up slightly, the modified categorical approach is itself a secondary measure—one taken only *after* certain analysis of the statutory provision at issue. Before this Court found the ACCA residual clause void for vagueness in *Johnson v. United States*, 135 S. Ct. 2551, 2257 (2015), Justice Scalia began his analysis of an attempted-burglary statute by using the categorical approach and looking only to the statutory elements. *See James v. United States*, 550 U.S. 192, 217 (2007) (Scalia, J., dissenting). Citing *Shepard*, he noted that this approach generally prohibits a later court from delving into the particular facts of a prior offense, as disclosed by the record of conviction, a situation that normally leaves the court looking only to the fact of conviction and the statutory definition of the prior offense. *Id.*

Justice Scalia simply reiterated what *Descamps* had made pellucid: the modified categorical approach does not constitute a "go-to" solution. Rather, it is an analysis available to courts only in certain circumscribed situations. *See Descamps*, 570 U.S. at 258 ("[W]e hold that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements."). And going back to the very beginning, *Descamps*, merely built on the foundation laid in *Taylor*: "the language of § 924(e) generally supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor*, 495 U.S. at 600.

As the *Taylor* Court expressed it, the categorical approach may permit sentencing courts "to go beyond the mere fact of conviction *in a narrow range of cases* where a jury was actually required to find all the elements of generic burglary." *Taylor*, 495 U.S. at 602 (emphasis added). Resort to the modified categorical approach requires certain factors to come into play. Because it is not a default solution, its process should not be read broadly to include a greater and greater array of available documentation for review. And certainly, it should not include review of complaints that contain assertions untested in judicial proceedings and without adoption by a defendant.

CONCLUSION

For these reasons, Mr. Williams asks this Honorable Court to grant this Petition for a Writ of Certiorari, vacate the Judgment of the Sixth Circuit Court of Appeals, and remand for reconsideration of his sentence with only judicial documents, as contemplated in *Shepard*, available for review.

Respectfully submitted,
Daqone Williams, Petitioner

Date: April 30, 2019

Scott Graham
Counsel of Record for Petitioner
SCOTT GRAHAM PLLC
1911 West Centre Avenue, Suite C
Portage, Michigan 49024-5399
Telephone: 269.327.0585
E-mail: sgraham@scottgrahampllc.com