

IN THE
Supreme Court of the United States

SLORNAVEED PATOLILLO GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Government does not dispute the importance of the question presented in numerous federal criminal and immigration cases, or to the parties negotiating pleas to state charges. Nor does it defend the Ninth Circuit's erroneous view that, in applying the modified categorical approach, a court may rely on facts alleged but not admitted. Instead, the Government argues that Mr. Gonzalez's challenge is fact-specific, that the courts of appeals are not really split on the issue, and that alternative grounds exist for affirmance. None of these contentions is accurate.

Contrary to the Government's suggestion (*e.g.*, BIO I, 7, 9, 10), the question presented is *not* whether the modified categorical approach was correctly applied. Rather, the question is whether the modified approach, as a general matter, permits a court to consult a charging document to which a pleading defendant did *not* plead guilty. Pet. i; *see* Pet. 5-13. In addressing the Ninth Circuit's departure from its sister circuits, the Government ultimately acknowledges (BIO 10-12) that this is the true, broadly applicable issue.

The Government nonetheless fails to reconcile the Ninth Circuit's answer with that of the Third, Fourth, Fifth, Sixth, and Eighth Circuits. On the one hand, the Government agrees that, in the latter five circuits, courts "may not 'rely upon allegations in a superseded indictment to which the defendant did not plead guilty.'" BIO 11 (quoting *United States v. Martinez*, 756 F.3d 1092, 1093 (8th Cir. 2014)); *e.g.*, *id.* at 10-11. On the other hand, the Government concedes (BIO 11-12), as it must, that the Ninth Circuit consulted the indictment here, even though "the plea agreement stated it was amending the charging document" (App. 6a). The

Government’s invocation of Tenth Circuit authority (BIO 10) only deepens the split, as the Tenth Circuit takes yet a third, state law-centric approach. The Government’s own conflicted view ultimately illustrates the Ninth Circuit’s outlier status and the attendant need for this Court’s attention.

The Government’s vehicle objection (BIO 12-14) rests on flawed arguments it sensibly waived below. The parties have always agreed that the threshold and “pivotal issue” (App. 3a) is whether Mr. Gonzalez’s Arizona conviction is an aggravated felony—which, in turn, rests on whether the pre-amendment indictment was a proper source for consultation. That issue is squarely presented and warrants review.

I. The Government Fails to Dispel the Circuit Split Over Whether the Modified Categorical Approach Permits a Court to Rely on an Inoperative Charging Document Where the Defendant Pleaded Guilty.

The petition does not (*contra* BIO 7-9) seek review of the correctness of a “fact-bound application” of the modified categorical approach. Rather, it presents the broadly applicable question of whether the modified approach “permits reliance on a charging document to which the defendant did *not* plead guilty to conclude that the offense to which he *did* plead guilty constitutes an aggravated felony.” Pet. i. The courts of appeals are irretrievably divided on that question. The Government fails to show otherwise.

1. The Government agrees (BIO 11) that, in the Third, Fourth, Fifth, Sixth, and Eighth Circuits, a court applying the modified approach may not “rely upon allegations in a superseded indictment to which the defendant did not plead guilty.”

Martinez, 756 F.3d at 1093; *see Evanson v. Att’y Gen. of U.S.*, 550 F.3d 284, 293 & n.7 (3d Cir. 2008); *Prudencio v. Holder*, 669 F.3d 472, 485-86 (4th Cir. 2012); *United States v. Bonilla*, 524 F.3d 647, 652-53 (5th Cir. 2008); *United States v. Gardner*, 649 F.3d 437, 444 (6th Cir. 2011). As the petition showed (at 6), these circuits recognize that a defendant does not admit the allegations in a charging document that has been amended or superseded. *See, e.g., Martinez*, 756 F.3d at 1097. All that such an instrument shows is “what the defendant actually did,” which is irrelevant under the modified categorical approach. *Id.* (quoting *Descamps v. United States*, 570 U.S. 254, 268 (2013)). The original indictment therefore “cannot be used to pare down the statute of conviction to determine under which subsection [the defendant] pleaded guilty.” *Bonilla*, 524 F.3d at 652 (citation and internal quotation marks omitted).

In stark contrast, the Ninth Circuit holds that, where the judgment “specifies that a defendant pleaded guilty to a particular count of the criminal complaint or indictment, [the court] can consider the facts alleged in that count.” *Cabantac v. Holder*, 736 F.3d 787, 793-94 (9th Cir. 2013) (per curiam); *accord United States v. Torre-Jimenez*, 771 F.3d 1163, 1168 (9th Cir. 2014); *United States v. Valdavinosa-Torres*, 704 F.3d 679, 684 (9th Cir. 2012). The decision below makes clear that this rule applies even where the complaint or indictment was superseded or amended: all that matters is that the charging instrument and the plea agreement or judgment refer to the same numbered count, e.g., “Count 2.” *See* App. 4a-5a (citing *Torre-Jimenez*, 771 F.3d at 1169). As the Ninth Circuit has acknowledged, the purpose of this exercise is to determine whether the “conduct [described] amount[s] to a crime of

violence.” *Cabantac*, 736 F.3d at 794. In other words, what five other circuits hold is proscribed by *Descamps*, the Ninth Circuit endorses.

Grasping to square the decision below with the contrary rule of the five-circuit majority, the Government proclaims (BIO 12) that Mr. Gonzalez’s plea agreement did not “supersede[]” the indictment. But, as the petition showed (at 3), and as Judge Schroeder implicitly concluded (App. 6a), the terms of the plea agreement converted the plea agreement into the charging document and “conform[ed] any previously filed documents to the terms of the plea[.]” *State v. Buckley*, 734 P.2d 1047, 1050 (Ariz. Ct. App. 1987)). If this case had arisen in the Third, Fourth, Fifth, Sixth, or Eighth Circuits, Judge Schroeder’s view that the indictment could not be considered would have prevailed.

2. Contrary to the Government’s contention (BIO 11), *Alvarado v. Holder*, 759 F.3d 1121 (9th Cir. 2014), does not undermine the division between the Ninth Circuit and its sisters on the question presented. In *Alvarado*, the original indictment was “dismissed,” *id.* at 1131—not amended or superseded. The court of appeals’ appropriate refusal to consider the dismissed indictment did not implicate the question here, i.e., whether the modified approach permits consultation of an indictment that was amended or superseded but not formally dismissed.

3. The Government similarly misses the point (BIO 11-12) in noting that both the Sixth and Ninth Circuits permit reference to a superseded charging instrument where the defendant pleaded guilty to a lesser-included offense. *Gardner*, 649 F.3d at 442; *Ruiz-Vidal v. Lynch*, 803 F.3d 1049, 1052-55 (9th Cir. 2015). This argument

is irrelevant. As the Government acknowledges (BIO 12), this case does not involve a lesser-included offense. Rather, it involves a plea to an offense *wholly different* from that charged in the original indictment, as evidenced by the plea agreement and judgment's citation to the reckless endangerment statute, A.R.S. § 13-1201.

4. The Government fumbles (BIO 10) in relying on *United States v. Antonio-Agusta*, 672 F.3d 1209 (10th Cir. 2012), for its assertion that “the decisions that petitioner cites (Pet. 6) ... do not preclude all consideration of original allegations that underlie an amended charge to which a defendant unambiguously pleads guilty.” Mr. Gonzalez did not cite *Antonio-Agusta*, or any Tenth Circuit authority, for that matter. Far from diminishing the circuit split, however, that case offers yet a third approach that deepens the conflict.

In *Antonio-Agusta*, the Tenth Circuit looked to the applicable *state* law to ascertain the relevance of the indictment. 672 F.3d at 1213-16 & n.6. Although the judgment indicated that the defendant pleaded guilty to amended charges, state law indicated that the language present in the defendant's judgment incorporated the indictment by reference. *Id.* at 1213. What mattered to the Tenth Circuit was how the state court would interpret its own documents.

The court below, on the other hand, relied on the pre-amendment indictment even though, under Arizona law, the indictment was no longer the operative pleading. Pet. 3; *supra* I.1. Indeed, in the Ninth Circuit's view, its own post-hoc reading overrides the law of the state of conviction in determining the offense to which the defendant pleaded guilty. *See, e.g., Cabantac*, 736 F.3d at 793-94 (holding that, where

the judgment “specifies that a defendant pleaded guilty to a particular count of the criminal complaint or indictment, ... we can consider the facts alleged in that count[.]” and applying that rule to the defendant’s California conviction even though, under California law, “a guilty plea to an offense does not necessarily mean the defendant admitted all the facts alleged in the indictment”); *accord Valdavinos-Torres*, 704 F.3d at 684. The Ninth Circuit’s conflict with the Tenth Circuit concerning the relevance of state law in interpreting state conviction documents—in addition to the conflict with the Third, Fourth, Fifth, Sixth, and Eighth Circuits invoked in the petition—constitutes yet more reason to grant review.

The Government ultimately offers no viable basis for its refusal to acknowledge that the decision below directly conflicts with the decisions of *six* other courts of appeals. This Court’s review is necessary to resolve the split.

II. The Government Fails to Defend the Ninth Circuit’s Departure from This Court’s Precedents Precluding Reliance on Facts Not Admitted to Determine a Pleading Defendant’s Offense of Conviction.

The Government does not dispute that *Shepard v. United States*, 544 U.S. 13 (2005), and its progeny, e.g., *Descamps* and *Mathis v. United States*, 136 S. Ct. 2243 (2016), preclude a court applying the modified categorical approach to a pleading defendant from relying on facts not necessarily admitted to establish the offense of conviction. Instead, the Government denies that the Ninth Circuit did so: it contends (BIO 8-9) that the court below consulted the pre-amendment indictment “to decipher petitioner’s plea agreement and the judgment of conviction,” and not “to determine the facts of [his] crime of conviction[.]” The Government’s contention falls flat.

1. As a threshold point, this argument does little to dispel the circuit split. The Fourth, Fifth, and Eighth Circuits have squarely rejected reliance on a pre-amendment charging instrument “to pare down the statute of conviction to determine under which subsection [the defendant] pleaded guilty.” *Bonilla*, 524 F.3d at 652 (citation and internal quotation marks omitted); see *Prudencio*, 669 F.3d at 486; *Martinez*, 756 F.3d at 1096.

The distinction the Government seeks to draw is one without a difference in any case. In consulting the pre-amendment indictment, the court below relied on its published case law requiring it “to look to the *facts* alleged in [Count 2] in the charging document.” *Torre-Jimenez*, 771 F.3d at 1169 (emphasis added); see App. 4a-5a (citing *Torre-Jimenez*). The Ninth Circuit has long understood that, when it consults an indictment, it does so for the purpose of ascertaining whether the defendant’s “conduct amount[s] to a crime of violence.” *Cabantac*, 736 F.3d at 794 (citing *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (en banc), *abrogated on other grounds by Young v. Holder*, 697 F.3d 976, 986 (9th Cir. 2012) (en banc)) (emphasis added).

2. Scrutiny of the Ninth Circuit’s rule is critical in light of its due process implications. By applying its own, across-the-board assumption that a judgment referencing the same count in a superseded or pre-amendment charging document incorporates the facts originally alleged, the Ninth Circuit ignores the intent of the parties with respect to a defendant’s plea as well as the realities of pleading practice in state courts. Pet. 10-11. As a result, a defendant who did not plead guilty to an

offense that is a categorical match to a generic offense may be treated as though he did, “based on legally extraneous statements found in the old record.” *Descamps*, 570 U.S. at 271. The Ninth Circuit’s one-size-fits-all rule is thus nothing more than a legal fiction that “allow[s] a later [federal] court to rewrite the parties’ bargain.” *Id.*

Federal courts “cannot so easily undo a plea made in state court[,]” however. *Cabantac*, 736 F.3d at 790 n.4 (Murgia, J., dissenting from denial of reh’g en banc). If the defendant did not understand the basis for his plea, it was not knowing and voluntary in the first instance. Pet. 10-11. Nor can defense counsel competently advise her client of the collateral consequences of his plea if she cannot reasonably predict how the plea will be interpreted for those purposes. *Cabantac*, 736 F.3d at 791 n.6 (Murgia, J., dissenting from denial of reh’g en banc) (citing *Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010)). Indeed, eight Ninth Circuit judges have opined that, “[b]ased the current state of the law in this circuit there is a real risk that criminal defendants will be deprived of the intended benefit of their plea, a prospect that ‘would seem unfair.’” *Cabantac*, 736 F.3d at 791 (Murgia, J., dissenting from denial of reh’g en banc) (quoting *Descamps*, 570 U.S. at 271) (in turn quoting *Taylor v. United States*, 495 U.S. 575, 601-02 (1990)).

Nonetheless—and notwithstanding *Descamps*—the Ninth Circuit has declared itself “bound” to its outlier position “[u]nless and until our cases are overruled by an intervening Supreme Court or en banc decision” *Torre-Jimenez*, 771 F.3d at 1169. The Ninth Circuit’s own call for review well illustrates the need for clarity and course-correction. This Court should heed that call and grant the petition.

III. This Case Is An Ideal Vehicle to Resolve the Important Question Presented.

The Government does not dispute that the question presented is exceptionally important or that it frequently recurs in immigration and federal criminal cases nationwide. Nor does the Government quarrel with the importance to state criminal defense counsel and their clients of clarity, predictability, and consistency in how state conviction documents are later treated.

“Unfortunately, [the Ninth Circuit] ha[s] provided incoherent guidance” on this issue to the untold number of stakeholders within its jurisdiction. *Cabantac*, 736 F.3d at 789 (Murgia, J., dissenting from denial of reh’g en banc). This case is an ideal vehicle to resolve that problem because the facts are simple and, contrary to the Government’s contention (BIO 12), no other ground exists for affirmance. Pet. 13-14.

1. As the petition showed (at 13-14), the disposition cannot be affirmed on Judge Schroeder’s suggested basis (App. 6a) because Judge Schroeder was incorrect that Mr. Gonzalez’s plea “to a class 3 felony in violation of A.R.S. § 13-1204” meant that “he must have admitted to violating either subsections (a)(1) or (a)(2)”; subsection (a)(11) is also a class 3 felony but *not* an aggravated felony. Pet. 13-14. The Government now concedes that subsection (a)(11) is a class 3 felony but argues that it *is* an aggravated felony. BIO 12-13. This is invited error, as the Government argued in the court below that *only* subsections (a)(1) and (a)(2)—but not (a)(11)—were class 3 felonies. C.A. Gov’t Br. 9, 14. At a minimum, the Government waived the argument it proffers here. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-40 (1989).

The Government’s argument (BIO 12-13) is also unpersuasive because Mr. Gonzalez’s plea was to a single offense that was *also* in violation of A.R.S. § 13-1201. In assuming that the class 3 felony designation was controlling, Judge Schroeder, like the panel majority, disregarded the citation to A.R.S. § 13-1201 as a “discrepancy.” App. 4a. As the petition showed (at 9-11), this decision amounts to rewriting the conviction, which, in turn, deprived Mr. Gonzalez of the benefit of his plea and violated his Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See Descamps*, 570 U.S. at 271; *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (“we must presume that the conviction ‘rested upon [nothing] more than the least of th[e] acts criminalized”).

2. It was undisputed—both in the district court and in the court of appeals—that whether Mr. Gonzalez’s Arizona offense “was correctly deemed a crime of violence, and therefore an ‘aggravated felony,’” was “the pivotal issue[.]” App. 3a. Only once that issue was resolved in his favor would the court continue to the second step of the inquiry, addressing whether his deportation was fundamentally unfair. The Government’s newfound assertion (BIO 13-14) that this case can be affirmed without addressing the threshold issue has been waived and is also unpersuasive.

The Government’s primary argument (BIO 13)—that Mr. Gonzalez was ineligible for *post-hearing* voluntary departure (*see* App. 11a-12a)—is a red herring. Mr. Gonzalez has never argued that he was.

The Government also errs (BIO 13-14) in defending the district court’s legally erroneous conclusion that Mr. Gonzalez was ineligible for *pre-hearing* voluntary departure (App. 11a). As Mr. Gonzalez showed in the court below, he would have been entitled to challenge the INS’s aggravated felony allegation without sacrificing his eligibility for that relief. C.A. Op. Br. 47-50. The Government failed to respond, thereby waiving its present assertion. *See* C.A. Reply Br. 3; *Granfinanciera*, 492 U.S. at 38-40; *United States v. Orozco*, 858 F.3d 1204, 1210 (9th Cir. 2017).

Because it resolved this case against Mr. Gonzalez at step one, the court of appeals never reached step two of the inquiry. It thus never addressed Mr. Gonzalez’s arguments why his deportation was fundamentally unfair. Should this Court grant review and decide the case in Mr. Gonzalez’s favor, remand will be necessary for the court of appeals to reach that second step in the first instance. *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018). But the fact that the question presented is a threshold one poses no barrier to review. *See, e.g., Moncrieffe*, 569 U.S. at 206-07; *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010); *Shepard*, 544 U.S. at 26. Given the exceptional importance of the issue and the vast landscape of cases in which it arises, review is warranted.

CONCLUSION

The petition should be granted.

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