No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

MOISES BARANDA-CUEVAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Respectfully submitted,

JAMES WYDA
Federal Public Defender
District of Maryland

PARESH S. PATEL
Staff Attorney
6411 Ivy Lane, Suite 710
Greenbelt, Maryland 20770
Telephone: (301) 344-0600
Facsimile: (301) 344-0019

QUESTION PRESENTED

Can a federal sentencing court look beyond the face of a statute and apply the modified categorical approach to determine whether a prior conviction is a "crime of violence" for purposes of a federal recidivist sentencing enhancement, even though the statute of the prior conviction enumerates a single offense that is not expressly divisible with alternative elements, some of which constitute a "crime of violence" and some of which do not?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes, Sentencing Guidelines, and Rules

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

MOISES BARANDA-CUEVAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petitioner, Moises Baranda-Cuevas, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit rendered in this case on March 18, 2011.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is found at *United States v. Baranda-Cuevas*, 2011 WL 934014 (4th Cir. March 18, 2011). The opinion is reproduced in the Appendix. App. at A1.[1]

---

[1] App. refers to the Appendix followed by the page number.

JURISDICTION

Jurisdiction in the United States Court of Appeals for the Fourth Circuit was based on 28 U.S.C. § 1291. The Fourth Circuit issued a decision in Mr. Baranda-Cuevas' case on March 18, 2011 affirming his district court sentence. *See United States v. Baranda-Cuevas*, 2011 WL 934014 (4th Cir. March 18, 2011). This Court's jurisdiction to review the decision is invoked under 28 U.S.C. § 1254(1). *See* S. Ct. R. 10(a) and 10(c).

STATEMENT OF THE CASE

On October 29, 2009, Mr. Baranda-Cuevas pleaded guilty to one count of unlawfully reentering the United States in violation of 8 U.S.C. § 1326(a). On February 5, 2010, the district court sentenced Mr. Baranda-Cuevas to 46 months imprisonment after finding that he qualified for a 16-level offense increase under U.S.S.G. § 2L1.2(b)(1)(A).

The court made this finding after concluding that Mr. Baranda-Cuevas' previous conviction for a 2008 Maryland second degree assault offense in violation of Md. Code, Crim. Law § 3-203(a) was a "crime of violence" within the meaning of § 2L1.2(b)(1)(A). *See* U.S.S.G. § 2L1.2, cmt. n.1(B)(iii). Mr. Baranda-Cuevas pleaded guilty to that assault in the District Court of Maryland for Baltimore County, and the court imposed a sentence of 47 days imprisonment with credit for time served. Over Mr. Baranda-Cuevas' written and oral objections, the federal district court determined that his prior assault was a "crime of violence" because as required under § 2L1.2, cmt. n. 1(B)(iii), it had "as an element" the use of "physical force."

Even though it was uncontested that the statutory definition of second degree assault in Maryland does not require the use of "physical force" as contemplated under § 2L1.2(b)(1)(A), the district court looked beyond the face of the Maryland assault statute to make a "crime of

violence" finding. Specifically, the federal district court looked to the conduct underlying Mr. Baranda-Cuevas' assault conviction, as reflected in his plea colloquy, to conclude that the prior conviction involved the use of "force" necessary to constitute a "crime of violence" under § 2L1.2(b)(1)(A). The state plea transcript demonstrated that Mr. Baranda-Cuevas pleaded guilty to second degree assault after punching the complainant. Mr. Baranda-Cuevas argued that the federal sentencing court could not consider this individual conduct, but instead was limited to the elements of second degree assault in determining whether his prior assault qualified as a "crime of violence." The district court disagreed and held that under the modified categorical approach, it was obligated to consider the facts from the plea transcript. Relying on these facts, the court concluded that the prior assault involved the use of physical force, and thus, was a "crime of violence under § 2L1.2(b)(1)(A).

The district court's "crime of violence" finding under § 2L1.2 increased Mr. Baranda-Cuevas' Sentencing Guidelines base offense level of 8 by 16 points for a total base offense level of 24. After a three-level decrease for acceptance of responsibility, the court found Mr. Baranda-Cuevas' final offense level to be 21. With a criminal history category of III, Mr. Baranda-Cuevas' corresponding Sentencing Guidelines range was 46-57 months. The district court sentenced him to 46 months. Absent the § 2L1.2 enhancement, Mr. Baranda-Cuevas' Sentencing Guidelines range would have been 6-12 months (corresponding to an offense level of 8 and criminal history category of III).

Mr. Baranda-Cuevas then filed an appeal in the Fourth Circuit and asked the Court to vacate his sentence and remand his case to the district court for resentencing. In the appeal, Mr. Baranda-Cuevas argued that the district court erroneously found that his Maryland second degree

assault conviction was a "crime of violence" under § 2L1.2(b)(1)(A). Mr. Baranda-Cuevas reiterated that under the categorical approach, Maryland second degree assault (Md. Code, Crim. Law § 3-203(a)) can never qualify as a "crime of violence" because the statutory definition of the offense does not have as an element the use of "force," which means "violent force – that is force capable of causing physical pain or injury to another." *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010). Mr. Baranda-Cuevas highlighted that § 3-203(a) of the Maryland law merely provides that "a person may not commit an assault." Under this statute, the term "assault" retains its common law definition, which means an attempted battery or intentional of placing of a victim in reasonable apprehension of an imminent battery. *See* Md. Code, Crim. Law § 3-201(b); *Lamb v. State*, 613 A.2d 402, 411 (Md. Ct. Spec. App. 1992). Battery is "any unlawful force used against a person of another, *no matter how slight*." *State v. Duckett*, 510 A.2d 253, 257 (Md. 1986) (inner citation and quotation omitted). Because battery, and by definition a § 3-203(a) assault, does not have an element of "violent force," Mr. Baranda-Cuevas argued that on its face, second degree assault was not a "crime of violence" under § 2L1.2(b)(1)(A).

Moreover, Mr. Baranda-Cuevas in great length discussed that the district court had no authority to look beyond the face of the assault statute underlying his conviction to determine whether the prior assault involved the use of "violent force." He argued that only if a statute of a prior offense explicitly delineates multiple crimes – some which require proof of "violent force" and some which do not – may a federal sentencing court apply the modified categorical approach and look beyond the statutory definition to examine a limited list of judicial records authorized under this Court's jurisprudence in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005) to determine which part of the statute was violated.

Because the Maryland assault statute under § 3-203(a) defines a single offense – "the unlawful application of force, no matter how slight," *Duckett*, 510 A.2d at 257 – Mr. Baranda-Cuevas emphasized that the district court had no authority to look beyond the face of the Maryland assault statute to make a "crime of violence" finding under § 2L1.2(b)(1)(A). Instead, he argued that the district court was limited to the legal definition of second degree assault to determine whether the offense required an element of "violent force," and it plainly did not. Thus, Mr. Baranda-Cuevas urged the Fourth Circuit to find that the prior assault conviction under Maryland law was not a "crime of violence."

Nonetheless, the Fourth Circuit summarily concluded that Maryland second degree assault encompasses both violent and non-violent conduct, and thus, affirmed the district court's use of the modified categorical approach to make a "crime of violence" finding. *Baranda-Cuevas*, 2011 WL 934014, at *1. In other words, under the Fourth Circuit's reasoning in *Baranda-Cuevas*, because Maryland second degree assault can be *factually* committed in a manner that constitutes a "crime of violence" and in a manner that does not, the modified categorical approach is appropriate, even though the Maryland second degree assault statute itself is not expressly divisible in this manner and does not have an element of "violent force."

This petition for certiorari now follows.

REASONS FOR GRANTING PETITION

Mass Confusion Exists Within And Amongst the Circuits As To When A Federal Sentencing Court Can Look Beyond The Face Of A Statute And Apply The Modified Categorical In Determining Whether A Prior Conviction Constitutes A "Crime Of Violence" For Purposes Of A Federal Recidivist Sentencing Enhancement.

Under *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005), it is well settled that generally, a federal sentencing court must employ a categorical approach in deciding whether a prior conviction constitutes a "crime of violence" for purposes of a recidivist sentencing enhancement.[2] The categorical approach requires a court to examine the prior conviction generically, "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008). This means that courts must look to the plain language of the statute of conviction, not the facts of the underlying conviction, when determining whether a prior conviction is a "crime of violence." *Id; see also James v. United States*, 550 U.S. 192, 202 (2007) ("we consider [] the *elements of the offense* . . . without inquiring into the specific conduct of this particular offender"); *Sykes v. United States*, __ S. Ct. __, 2011 WL 2224437 (2011) (same); *Taylor*, 495 U.S. at 600 (in determining whether a prior

---

[2] The issue in *Taylor* and *Shepard* was whether the defendant's prior conviction constituted a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA), but it is well settled in the federal courts of appeals that the categorical approach adopted in those cases equally applies when a court is determining whether a prior conviction is a "crime of violence" under § 211.2 and other similar Sentencing Guidelines such as the career offender provision, § 4B1.1. *See United States v. Rivers*, 595 F.3d 558, 559 n. 1 (4th Cir. 2010); *United States v. Johnson*, 587 F.3d 203, 208 (3d Cir. 2009); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1118 (10th Cir. 2008); *United States v. Woods*, 576 F.3d 400, 403-04 (7th Cir. 2009); *United States v. Otero*, 502 F.3d 331, 335 (3d Cir. 2007); *United States v. Aguilar-Ortiz*, 450 F.3d 1271, 1274 n.4 (11th Cir. 2006); *United States v. Calderon-Pena*, 383 F.3d 254, 257 (5th Cir. 2004).

conviction constitutes a "violent felony" under the Armed Career Criminal Act, federal sentencing courts may look "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions"). As the Supreme Court emphasized in *Taylor*, it is particularly important that a federal sentencing court adhere to the categorical approach when the sentencing enhancement in issue expressly refers "to the elements of the statute of conviction, not to the facts of each defendant's conduct." *Taylor*, 495 U.S. at 601. The categorical approach is also important to prevent "the practical difficulties and potential unfairness of a factual approach" that would lead to mini-trials and evidentiary issues on collateral matters that would be "daunting" to resolve. *Id.*

However, this Court in *Taylor* and its progeny did indicate that in a narrow range of cases, a federal sentencing court may look beyond the face of the statute of a prior offense to a limited list of reliable documents authorized under *Taylor* and *Shepard* to determine whether a prior offense constitutes a "crime of violence." *Shepard*, 544 U.S. at 19-24; *Taylor*, 495 U.S. at 602. This is known as the modified categorical approach. A careful review of this Court's jurisprudence indicates that the modified categorical approach only applies in those rare instances where the statute itself expressly delineates alternative elements – some of which constitute a "crime of violence" and some of which do not. As further discussed below, this Court has indicated that only when the statute is expressly divisible into violent and non-violent crimes can a federal sentencing court look to *Taylor/Shepard* authorized documents to determine *which* part of the statute was violated – not *how* the defendant committed the prior offense. This narrow approach assures that federal sentencing courts are not engaged in a case-by-case analysis of the facts in the case to determine what the defendant actually did in an individual case, but rather that

the focus remains on the elements of the offense called for by the categorical approach.

Nonetheless, the Fourth Circuit as well as a number of other Circuits are utterly confused about the reach of the modified categorical approach, and some have expanded its application far beyond that intended by this Court. This confusion is well illustrated in Mr. Baranda-Cuevas' case. In his case, at issue was whether his prior offense for Maryland second degree assault under Md. Code, Crim. Law § 3-203(a) was a "crime of violence" within the meaning of § 2L1.2(b)(1)(A), cmt. n. 1(B)(iii). Under U.S.S.G. § 2L1.2(b)(1)(A), a prior conviction is a "crime of violence" if it "has an element the use, attempted use, or threatened use of physical force against the person of another." ("force" clause). *See* § 2L1.2 cmt. n. 1(B)(iii).[3] Force means "violent force" which is capable of causing pain or bodily injury. *See Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010).[4]

The district court in Mr. Baranda-Cuevas' case applied the modified categorical approach and looked beyond the elements of the Maryland second degree assault statute to find that his prior offense involved the use of "violent force," and thus qualified as a "crime of violence under § 2L1.2. Specifically, the district court looked to the facts in the plea colloquy of the prior offense to make this finding. The Fourth Circuit affirmed this holding even though the Maryland second degree assault statute enumerates a single offense that lacks an element of "violent force."

---

[3] Under § 2L1.2(b)(1)(A), a felony is also a "crime of violence" if it is one of twelve enumerated offenses. *See* U.S.S.G. § 2L1.2 cmt. n. 1(B)(iii); however, it is undisputed that Mr. Baranda-Cuevas' prior assault conviction is not one of these enumerated crimes.

[4] In *Johnson*, at issue was whether the defendant's prior conviction constituted a "violent felony" under the "force" clause of the ACCA, but the clause is identical to that defining "crime of violence" in § 2L1.2, cmt. n. 1(B)(iii). Therefore, the definition of "force" under the ACCA equally applies to § 2L1.2.

Baranda-Cuevas, 2011 WL 934014. In Maryland, assault is defined as "the unlawful application of force, no matter how slight." *State v. Duckett*, 510 A.2d 253, 257 (Md. 1986) (inner citation and quotation omitted). Even though this offense was not divisible with alternative elements, the Fourth Circuit still held that the modified categorical approach was appropriate to determine how the individual offense was factually committed. *Baranda-Cuevas*, 2011 WL 034014, at *1. In so doing, the Fourth Circuit, consistent with some of it other decisions, adopted a view of the modified categorical approach that excises the "elements" language from sentencing enhancements such as § 2L1.2, and permits a review of the individual facts of a case any time an offense can *be factually committed* in a manner that constitutes a "crime of violence" and in a manner that does not – a view that is contrary to this Court's sentencing jurisprudence.

Joining the Fourth Circuit, the Eighth and Tenth Circuits have also adopted this overly broad view of the modified categorical approach. At the same time, other decisions within these same Circuits have held the opposite, ruling that a federal sentencing court may only use the modified categorical approach and look beyond the face of the statute in making a "crime of violence" finding when the statute of prior conviction is itself expressly divisible enumerating elements that constitute violent crimes and elements that do not. As a result, an intra-Circuit split exists within the Fourth, Eighth, and the Tenth Circuits.

Moreover, the decisions in the Fourth, Eighth, and Tenth Circuits adopting the expansive view of the modified categorical approach are in deep conflict with the decisions of the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, which have all uniformly held that the modified categorical approach is only applicable when a statute enumerates multiple alternative elements.

The First and Second Circuits are undecided on the reach of the modified categorical approach. Thus, the parameters under which the modified categorical approach applies in those Circuits is unclear.

Mr. Baranda-Cuevas' case presents a perfect opportunity for this Court to bring clarity to the mass confusion relating to the modified categorical approach. This Court can do so by squarely curtailing the lower courts' expansion of the modified categorical approach far beyond that intended by this Court and limiting its application to expressly divisible statutes. This will assure that federal sentencing courts do not engage in a case-by-case analysis of the facts in a case to determine how a particular crime was committed rather than focusing on the elements of the statute. This is a critical issue that federal sentencing courts confront on a daily basis throughout the country in their application of criminal history enhancements not just under § 2L1.2, but under numerous other statutory and guidelines enhancements including the Armed Career Criminal Act (18 U.S.C. § 924(e)) (ACCA) and the career offender guideline (U.S.S.G. § 4B1.1). Because these recidivist enhancements routinely have a dramatic impact on defendants' sentences, it is of the upmost importance that this Court grant certiorari in this case and resolve this issue.

A. This Court Has Indicated That a Federal Sentencing Court Is Only to Use the Modified Categorical Approach in a Narrow Range of Circumstances When the Statute of the Prior Conviction Enumerates Alternative Elements – Some of Which Constitute a "Crime of Violence" and Some of Which Do Not.

This Court, in a series of decisions, has narrowly construed the modified categorical approach to only apply when the statute of the prior conviction discretely enumerates alternative elements – some of which constitute a "violent felony" and some of which do not.

In *Taylor*, this Court first indicated that the modified categorical approach only applies when a statute itself delineates multiple ways of committing a crime. 495 U.S. at 602. In *Taylor*, at issue was whether the defendant's prior Missouri burglary conviction qualified as a "violent felony" under the ACCA. In *Taylor*, this Court found that only a "generic burglary," i.e. a burglary which requires the elements of 1) unprivileged entry, 2) into a building or structure, 3) with intent to commit crime therein, can qualify as a "violent felony." 495 U.S. at 598. In Missouri, numerous burglary statutes existed – some of which included all the elements of generic burglary and some of which did not. *Id.* at 578 n.1, 599. In other words, the Missouri statutes were expressly divisible with alternative elements. Because the specific statute under which the defendant was convicted was unclear from the record before the Court, the Court suggested that the modified categorical approach was applicable to determine the statute under which the defendant was convicted. *Id.* at 602.

This Court next addressed the modified categorical approach in *Shepard*, 544 U.S. 13. In that case, the issue was whether the defendant's Massachusetts burglary convictions were "violent felonies" under the ACCA. The Massachusetts burglary statute at issue was expressly divisible. It explicitly prohibited unlawful entry into a *building* with intent to commit a crime therein (which is a violent felony) and unlawful entry into *cars and boats* (which is not a violent felony). *Id.* at 17. Because the statute had alternative elements, some of which constituted a "violent felony" and some of which did not, this Court held that a federal sentencing court could apply the modified categorical approach and look to *Shepard*-authorized documents to determine whether the defendant was necessarily convicted of entering a building – an element of the offense. *Id.* at 17-18.

In *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), this Court, again commented on the modified categorical approach. Although in that case the particular sentencing enhancement at issue did not call for a modified categorical approach, the Court summarized the parameters of the modified categorical approach as developed in *Taylor* and *Shepard*. Specifically, the Court emphasized that under the dictates of *Taylor* and *Shepard*, a federal sentencing court can only look to a limited list of documents from the prior case for the sole purpose of "determining *which statutory phrase* (*contained within a statutory provision* that covers several different generic crimes) covered a prior conviction." *Id.* at 2303 (emphasis added). These words make it self evident that even under the modified categorical approach, the focus remains on the words of the statute, and a federal sentencing court can only look to *Taylor*/*Shepard* authorized documents when the statute of the prior offense itself is expressly divisible with some phrases that constitute a "violent felony" and other phrases that do not.

In *Chambers v. United States*, 129 S. Ct. 687 (2009), this Court once again applied the modified categorical approach to a statute that was expressly divisible. In *Chambers*, at issue was whether a prior conviction under an Illinois statute constituted a "violent felony" under the ACCA. *Id.* at 690-91. The Illinois statute was divided into separate subsections – some of which constituted a "violent felony" and some of which did not. This Court treated each of these sections as "separate crimes." *Id.* Because the statute had alternative elements, the Court again held that the application of the modified categorical approach was appropriate to determine the specific subsection of which the defendant was convicted. *Id.*

Finally, in *Johnson v. United States*, 130 S. Ct. 1265 (2010), this Court reiterated the narrow parameters of the modified categorical approach. In that case, the Supreme Court

approved the use of the modified categorical approach only when the law under which a defendant is convicted "contains *statutory phrases* that cover several different generic crimes, some of which require violent force and some of which do not." 130 S. Ct. at 1273 (emphasis added). In *Johnson*, the prior conviction at issue was battery in violation of a Florida statute – a law that expressly delineated multiple ways in which the offense could be proven. For example, one subsection of the statute criminalized the *intentional striking* of another while another subsection prohibited the *actual or intentional touching* of another. *Id.* at 1269. In this manner, the statute enumerated separate crimes – one of which constituted a "violent felony" as well as one that did not. The first subsection – striking another – enumerated a crime that was on its face a "violent felony" while the second subsection – actual or intentional touching – did not. This Court held that actual or intentional touching did not constitute the use of "physical force" within the meaning of the ACCA, 18 U.S.C. § 924(e)(2)(B). The Court defined "physical force" as "violent force – that is force capable of causing physical pain or injury to another person." *Id.* at 1271. Looking to Florida law, the Court found that actual or intentional touching could be satisfied by any touching, "no matter how slight" including intentional, unwanted touching such as a tap on the shoulder. *Id.* at 1270-71. Such conduct, the Court found, did not constitute "violent force." Therefore, the subsection of the battery statute that criminalized intentional touching of another was not a "violent felony" under the ACCA. In contrast, the subsection of the battery statute that prohibited the intentional striking of another did on its face constitute "violent force."

Because the Florida battery statute explicitly delineated multiple crimes – one which required "violent force" and one which did not – the *Johnson* Court assumed that the federal

sentencing court could look to *Taylor-Shepard*-authorized documents to determine which of the statutory phrases was violated. Nonetheless, no *Taylor/Shepard* documents existed in the record to inform the district court of the specific Florida battery section of which the defendant was convicted. Hence, this Court held that the district could not find that the defendant was previously convicted of "violent force." Rather, the district court, at best, could only presume the that the defendant was convicted of the least of the acts prohibited in the statute – actual or intentional touching. *Id.* Because that act did not require "violent force," the Supreme Court found that it could not qualify as a "violent felony" under the ACCA.

B. The Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits Have All Held That a Federal Sentencing Court Can Only Apply the Modified Categorical Approach and Consider Documents from a Prior Case When the Statute of Conviction Is Divisible into Alternative Elements, Some of Which Constitute a "Crime of Violence" and Some of Which Do Not.

Consistent with the Supreme Court cases discussed above, numerous federal courts of appeals – including the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – have held that a federal sentencing court can only apply the modified categorical approach and consider *Taylor*/*Shepard* authorized documents in making a "crime of violence"/ "violent felony" finding when a statute is expressly divisible into violent and non-violent crimes (although as further discussed in the next section, some of these same Circuits have also held the opposite).

To begin with, in *United States v. Woods,* 576 F.3d 400 (7th Cir. 2009), the Seventh Circuit addressed this issue head on. In that case, the issue was whether a prior conviction for involuntary manslaughter under an Illinois statute was a "crime of violence" for purposes of the Guidelines career offender provision, U.S.S.G. §§ 4B1.1 and 4B1.2. The Seventh Circuit,

relying upon this Court's holdings in *Taylor*, *Shepard*, *Chambers*, *Nijhawan*, and others, held that in answering this question, the federal sentencing court could not look beyond the manslaughter statute because it was not *expressly divisible* into violent and non-violent offenses:

> The Government urges us to apply the "modified categorical approach," but we do not agree with it that the Illinois involuntary manslaughter statute is one to which the modified categorical approach applies . . . . *James*, *Taylor*, and *Shepard* permit a court to go beyond the statutory definition of the crime to consult judicial records (charging document, plea colloquy, etc.) only when the statute defining the crime is *divisible*, which is to say where the statute creates several crimes or a single crime with several modes of commission. By "modes of commission" we mean modes of conduct identified in the statute. The Illinois involuntary manslaughter statute is not divisible in this way, and we have no occasion to consult the record further in order to resolve Woods' appeal.

Id. at 411 (emphasis added). In so doing, the Seventh Circuit further clarified that the modified categorical approach does not apply even when an offense can be factually committed in both a violent and non-violent manner:

> We recognize that [a statutory] definition can as a *factual* matter, include conduct that would constitute a crime of violence as well as conduct that would not. Some may think this is enough to justify a finding that violent conduct is covered, if the charging papers or other permissible sources show that the particular offense was violent . . . Whether this viewpoint would have merit on its own, is however, no longer open to us. The Supreme Court has spoken to this issue in a line of cases including *Shepard*, *James, Begay, Chambers v. United States,* and most recently *Nijhawan v. Holder*. In all them, it has opted for a rule that precludes deciding on a case-by-case basis whether a particular violation of a general statute posed the kind of risk that would justify the recidivism enhancements provided by the ACCA or the career offender Guidelines . . . . This rule [permitting the expanded inquiry] is not meant to circumvent the categorical approach by allowing courts to determine whether the actual conduct of the individual defendant constituted a purposeful, violent and aggressive act.

Id. at 405 (citation and inner quotation omitted); *see also United States v. Sonnenberg*, 628 F.3d 361, 367 (7th Cir. 2010) (modified categorical approach "may be applied under a recidivist enhancement where a statute specifies distinct modes of committing the prior offense. In that case, if the judgment

of conviction does not specify exactly which provision was violated, a court considering a recidivist enhancement may consider certain additional materials, such as charging and plea documents, but only for the limited purpose of determining under which part of a divisible statute the defendant was charged.") (inner quotation and citation omitted); *United States v. Ellis*, 622 F.3d 784, 798 (7th Cir. 2010) ("[i]mportantly the point of the modified categorical is to determine which part of a divisible statute the defendant was convicted of violating, *not* to evaluate the actual facts of the underlying case"); *United States v. Dismuke*, 593 F.3d 582, 589 (7th Cir. 2010) ("[W]hen the statute in question is divisible – that is, when it describes multiple offense categories, some of which would be crimes of violence and some of which would not – the Court has fashioned a modified categorical approach . . . . This modified categorical approach does not, however, inquire into the factual specifics of the defendant's conduct; the point of the expanded inquiry is not to consider what the defendant in fact did but to determine which category of crime the defendant committed"); *United States v. Hart*, 578 F.3d 674, 680 (7th Cir. 2009) ("In *Woods* . . . we [adopted] a strictly formal approach. Now a statute is divisible only if it *expressly* identifies several ways in which a violation may occur.") (citation omitted).

Likewise, the Fifth Circuit in *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) also went to great lengths to explain that the modified categorical approach only applies when "whenever a statute provides a list of alternative methods of commission – just as the statute in *Taylor* referred to burglaries of several different types of structures." *Id.* at 258. (citation omitted). The Court held that only then, can a federal sentencing court look to *Taylor*/*Shepard*-authorized documents "*for the limited purpose* of determining which of a series of disjunctive elements a defendant's conviction satisfies." *Id.* (citation omitted). "[T]he statute of conviction, not the

underlying conduct, is the proper focus." In rendering this decision, the Fifth Circuit rejected the Government's argument that a federal sentencing court can turn to the modified categorical approach and look at documents to determine whether a defendant factually committed a violent crime , even though the statute of the prior conviction itself does not have the element of physical force required to constitute a "crime of violence" under a § 2L1.2 recidivist sentencing enhancement. *Id.* at 257-58. The Court cautioned that such a factual approach would "essentially excise the 'element' language from the Guideline" and always lead to a case-by-case factual determination as to whether a prior conviction constitutes a "crime of violence."

> According to the government, the elements expand "beyond the statute" to include factual material about the method of committing the offense that, when alleged in charging papers, must then be proven at trial. That is, the government contends, if the statutory language itself fails to require force, we would turn to the manner of commission in the particular case (as charged) to see if *that* involved force. Thus, on this view, the ultimate question in this case would be whether Calderon-Pena's act of "striking a motor vehicle occupied by the Complainant with the Defendant's motor vehicle" involved the use of force. Under that approach of course, the analysis of the statute would be superfluous: the determinative factor would be the forcefulness of the defendant's underlying charged conduct, regardless of the statute of conviction. Each conviction under the child-endangerment statute would then require its own individualized "use of force" inquiry, asking whether a particular method of endangering – leaving a child in a hot car, leaving a child near a deep pool, denying medical treatment, and so on, [] - involves force. *This cumbersome approach would excise the "element" language from the Guideline*."

Id. at 257-58 (emphasis added).

In line with the Fifth and Seventh Circuits, the Ninth Circuit in *United States v. Aguilar-Turcios*, 582 F.3d 1093, 1097 (9th Cir. 2009), held the same. The Court squarely held that "the modified categorical approach applies only if the statute of conviction is divisible into several crimes, some which involve an aggravated felony and some of which do not." *Id.* The Court further explained that "[o]n the other hand, if the crime of conviction is *missing an element of the generic*

crime altogether, we can never find that a jury was actually required to find all the elements of the generic crime, and the modified categorical approach does not apply. In other words, if the crime of conviction lacks an element of the generic crime, the crime of conviction can never be narrowed to conform to the generic crime because the jury is not required – as *Taylor* mandates – to find all the elements of the generic crime" *Id.* (inner citation and quotation omitted) (emphasis added). The Ninth Circuit emphasized that this holds true, regardless of the facts to which the defendant admitted or the facts which the jury found. *Id.*

Although the Fourth Circuit held to the contrary in Mr. Baranda-Cuevas'case, *Baranda-Cuevas*, 2011 WL 934014, in *United States v. Rivers*, 595 F.3d 558, 563-64 (4th Cir. 2010), the Fourth Circuit ruled that the modified categorical approach applies "only when a statute prohibits different types of behavior such that it can be construed to enumerate separate crimes." *Id.* Specifically, in *Rivers*, the Fourth Circuit considered whether a conviction under South Carolina's statute criminalizing the failure to stop for a blue light was a "violent felony" under the ACCA. Under the South Carolina statute, a violation could have been *factually* committed with intentional and unintentional conduct, but the statute itself made no distinction between unintentional and intentional conduct. The Court, therefore, held that the South Carolina's "blue light" statute was not divisible into separate crimes – violent and non-violent. Instead, the statute criminalized one category of crime, which was not on its face a "violent felony." *See Rivers*, 595 F.3d at 564-65. The inquiry ended there, and the Court refused to deviate from the categorical approach and consider judicial documents showing *how* the crime was *factually* committed.

Likewise, although a split also exists within the Eighth Circuit itself, in *United States v. Boaz*, 558 F.3d 800, 808 (8th Cir. 2009), the Court adopted the same narrow view of the modified

categorical approach as the courts did in the above-discussed decisions: "When a statute is broadly inclusive, but contains no alternatives in its elements, we must apply the traditional categorical approach, and application of the modified categorical approach is inappropriate." *Id.* In *Boaz*, at issue was whether an Arizona auto-theft statute was amenable to a modified categorical approach for purposes of making a "violent felony" finding under the ACCA. The Court held that the modified categorical approach did not apply because the "Arizona statute [] contains no subdivisions or further delineations setting forth separate elements for proving different types of felony auto theft." *Id.*; *see also United States v. Salean*, 583 F.3d 1059, 1061 (8th Cir. 2009) ("Only when the statute in question proscribed discrete, alternative sets of elements, one or more of which was not, generically, a violent felony, do we apply a modified categorical approach that reviews [*Shepard*-authorized documents] to determine whether the defendant was in fact convicted of a violent felony alternative.") (inner quotation and citation omitted); *United States v. Forrest*, 611 F.3d 908, 910 (8th Cir. 2010) (same); *United States v. Williams*, 627 F.3d 324, 328 (8th Cir. 2010) ("Under the modified categorical approach, the court examines the *Taylor* and *Shepard* documents not to see how the particular crime at issue was committed on this occasion, but *only* to determine which part of the statute the defendant violated.") (inner quotation and citation omitted); *United States v. Webster*, 636 F.3d 916, 919 (8th Cir. 2011) (same).

The Third, Sixth, Tenth, and Eleventh Circuits have also expressed that the modified categorical approach may only be used to "determine *which* part of the statute was charged against the defendant, and thus, *which* portion of the statute to examine on its face." *United States v. Zuniga-Soto*, 527 F.3d 1110, 1121 (10th Cir. 2008) (inner quotation and citation omitted) (emphasis added). "[T]his examination does not entail a subjective inquiry as to whether the particular factual

circumstances underlying the conviction satisfy the criteria of the enhancement provision." *Id.* (inner quotation and citation omitted); *see also United States v. Soto-Sanchez*, 623 F.3d 317 , 320-21 (6th Cir. 2010) (modified categorical approach applicable "only to determine *which* crime within a statute the defendant committed, not *how* he committed that crime") (citation omitted); *United States v. Johnson*, 587 F.3d 203, 208 (3d Cir. 2009) ("Where a statute criminalizes different kinds of conduct, some of which would constitute crimes of violence while others would not, a court may look beyond the statutory elements to determine the particular part of the statute of which the defendant was actually convicted"); *United States v. Shannon*, 631 F.3d 1187, 1191-92 (11th Cir. 2011) ("Under the modified categorical approach we may determine which statutory phrase was the basis for the conviction by consulting a narrow universe of *Shepard* documents") (inner quotation and citation omitted). Under these holdings, it logically follows that the modified categorical approach only applies in the first place if a statute is expressly divisible. Only when a statute has multiple parts does it then make sense for a federal sentencing court to determine which part of the statute was violated under the modified categorical approach.

C. The Fourth Circuit's Decision in *United States v. Baranda-Cuevas* and Rulings of the Eighth and Tenth Circuits Permit a Federal Sentencing Court to Apply the Modified Categorical Approach Whenever a Prior Offense Can Be Factually Committed in a Manner That Constitutes a "Crime of Violence" – Even When the Statute of Prior Conviction Is Altogether Missing Elements That Constitute a "Crime of Violence.

An intra-Circuit split exists in the Fourth, Eighth, and Tenth Circuits. As discussed above, at times, each of these Circuits has held that the modified categorical approach only applies when the statute of the prior conviction is expressly divisible with elements that constitute a "crime of violence" and elements that do not. However, on other occasions, these Circuits have also applied the modified categorical approach to statutes that were not divisible. In these cases, the Circuits have

authorized federal sentencing courts to look beyond the elements of the prior offense to the specific facts of the individual case to determine whether the defendant's prior conviction was a "crime of violence" merely because the prior offense was one that could be factually committed in multiple ways – not because the statute itself enumerated multiple methods of committing the crime. This precedent not only creates an intra-Circuit split, but is in conflict with the Third, Sixth, Seventh, and Eleventh Circuits that have held the opposite as previously discussed.

Mr. Baranda-Cuevas' case is a striking example of the confusion in the Circuits on the appropriate use of the modified categorical approach. Although in *Rivers*, 595 F.3d at 562-65, the Fourth Circuit clearly explained that under the dictates of *Chambers*, the modified categorical approach only applies when a statute is expressly divisible into violent and non-violent crimes, in *Baranda-Cuevas*, 2011 WL 934014, the Court failed to adhere to this principle. In *Baranda-Cuevas*, even though the Maryland second degree assault offense at issue enumerated a single crime ("unlawful application of force, no matter how slight," *Duckett*, 510 A.2d at 257) that did not have an element of "violent force," the Fourth Circuit still held that the modified categorical approach applied because Maryland second degree assault can be *factually* committed in multiple ways with or without "violent force." In so doing, the Fourth Circuit looked to the factual manner in which the crime was committed in Mr. Baranda's individual case to determine that the prior offense involved "violent force." The Fourth Circuit's focus on the facts rather than the "violent force" element – which was missing altogether from the Maryland assault statute – is in direct conflict with its own case in *Rivers,* 595 F.3d at 562-65, and the Circuits which strictly limit the use of the modified categorical approach to expressly divisible statutes to determine the specific part of the statute under which the defendant was convicted. This split is further deepened by other Fourth Circuit cases,

which have adopted the same expansive view of the modified categorical approach as did the Court in *Baranda-Cuevas*. *See United States v. Alston*, 611 F.3d 219, 223 (4th Cir. 2010) (holding that modified categorical approach applies to Maryland second degree assault because offense can be factually committed in multiple ways, even though definition of offense itself is not divisible); *United States v. Kirksey*, 138 F.3d 120, 125 (4th Cir. 1998) (same); *United States v. Bethea*, 603 F.3d 254, 256 (4th Cir. 2010) (modified categorical approach applies whenever statute criminalizes conduct that can "generally committed" in multiple ways – not because statute itself is expressly divisible); *United States v. Clay*, 627 F.3d 959, 966 (4th Cir. 2010) (same).

The Eighth Circuit's decision in *United States v. Parks*, 620 F.3d 911, 914 (8th Cir. 2010) is also contrary to its own law in *Boaz*, 558 F.3d at 808 (8th Cir. 2009) and cases in other Circuits as detailed above, which restrict the modified categorical approach to expressly divisible statutes. In *Parks*, the Court explicitly recognized that it was rejecting the holding of other Circuits that the modified categorical approach only applies in making a "crime of violence" finding when the statute is not "textually divisible." *Id.* at 913-14. Instead, the Court read *Chambers* to hold that when the statute behind a prior offense is so broad that it can be factually committed in widely varying ways, the modified categorical approach applies, even if the statute itself is not expressly divisible. *Id.* at 914. The Eighth Circuit held this even though in *Chambers,* 129 S. Ct. at 691, the Illinois escape statute itself was divided into several subsections – some of which constituted "violent felonies" under the ACCA and some of which did not. Unlike the Illinois escape statute, the Missouri escape statute in *Parks* was a single one-section offense that prohibited escape from confinement, yet the Court applied the modified categorical approach and looked at the specific facts in judicial records to conclude that his prior offense was a "crime of violence" under the career offender provision of

the Guidelines. *Id.* at 913.

Likewise, in *United States v. Hernandez-Garduno*, 460 F.3d 1287, 1294 (10th Cir. 2006), the Tenth Circuit held that even though a Colorado assault statute did not have an element of force, the federal sentencing court could use the modified categorical approach and look to judicial documents to determine whether factually the defendant used force to qualify as a "crime of violence" under U.S.S.G. § 2L1.2. This factually intense inquiry that strays from the elements is an expansive view of the modified categorical approach that squarely conflicts with other Tenth Circuit law as well as that of other Circuits.

D. The First and Second Circuits Are Undecided on When a Federal Sentencing Court Can Use the Modified Categorical Approach to Make a "Crime of Violence" Finding.

That the Circuits are in need for guidance on the modified categorical approach is further reinforced by the indecisiveness of the First and Second Circuits on this issue. In *United States v. Brown*, 631 F.3d 573, 578 (1st Cir. 2011), the First Circuit acknowledged the danger of permitting federal sentencing courts to use the modified categorical approach when statutes are not expressly divided: "Absent statutory or similar clues, a court's creation of its *own* subdivisions may start down a slippery slope, ending with the selection of characteristics of the particular crime *as committed by the defendant* – the opposite of the categorical approach." The Court further explained that "[a] closely related issue is whether *Shepard* materials are to be used only to identify the offense among those created by the statute or (again, the slippery slope problem arises) to create categories of offenses." *Id.* With that said, the First Circuit acknowledged that "the circuits have reached different outcomes in addressing this problem, sometime unconsciously, and even within our own circuit the case law may not be crystal clear." *Id.* Nonetheless, in *Brown*, the First Circuit did not

conclusively resolve the issue.

Likewise, the issue remains undecided in the Second Circuit. The Second Circuit has explicitly acknowledged that it is unclear under which circumstances a federal sentencing court can turn to the modified categorical approach in making a "crime of violence" finding. *Lanferman v. Board of Immigration Appeals*, 576 F.3d 84, 90 (2d Cir. 2009). The Second Circuit has outlined at least two opposite approaches that it might adopt in determining whether the modified categorical approach applies. First, the Second Circuit has indicated that it might permit the modified categorical approach to apply "where the alternative means of committing a violation are enumerated as discrete alternatives, either by use of disjunctives or subsections" (in other words, where the statute is expressly divisible). *Id.* On the other hand, the Second Circuit has indicated that it might adopt the more expansive version of the modified categorical approach that permits federal sentencing courts to look beyond the elements to judicial records whenever an offense can be factually committed by either violent or non-violent conduct. *Id.*

E. Consistent with its Previous Decisions, this Court Should Adopt the View That a Federal Sentencing Court Can Only Use the Modified Categorical Approach in Making a "Crime of Violence" Finding When the Statute of Conviction Is Divisible into Multiple Crimes, Some with Elements That Constitute a "Crime of Violence" and Some with Elements That Do Not.

Consistent with its prior precedent, this Court should adopt the view of the Circuits that have established the bright line rule that a federal sentencing court can only use the modified categorical approach when a statute expressly delineates alternative elements – some of which constitute a "crime of violence" and some of which do not. To hold otherwise and permit a federal sentencing court to use the modified categorical approach and look beyond the face of the statute whenever an offense can be *factually* committed in multiple ways, would mean that a federal sentencing court

could always use the modified categorical approach. For example, an offense, even as minor as a theft, can always be factually committed in a way that involves violence, even though most theft statutes do not have an element of "violent force." This would mean that the use of the modified categorical approach would become the norm rather than the rare exception contemplated by this Court. Also, this expansive approach would do violence to recidivist sentencing enhancements such as the ACCA, § 2L1.2, the career offender provision (U.S.S.G. § 4B1.1), and all others which require that prior offenses have certain *elements* in order to qualify as "crimes of violence"/ "violent felonies." If federal courts are permitted to use the modified categorical approach any time an offense can be factually committed in multiple ways, this would mean that federal sentencing courts would be assessing facts of individual cases to determine how the offense was committed, and not to determine whether the defendant was convicted of elements within the statute. This fact-driven approach would eviscerate an elements-driven approach and lead to a daunting case-by-case inquiry of underlying facts on collateral matters that this Court has repeatedly warned against. To prevent this circumvention of a focus on the elements, this Court should grant certiorari and clearly establish a bright line rule that strictly prohibits federal courts from using the modified categorical unless the elements of the statute are expressly divisible into violent and non-violent crimes. This will prevent the ever increasing abuse of the modified categorical approach.

F. This Court Should Clarify the Mass Confusion in the Circuits about the Parameters of the Modified Categorical Approach Because District Courts Regularly Confront this Issue in Applying a Wide Range of Federal Sentencing Enhancements That Are Routinely Driven by Defendants' Criminal History.

Mr. Baranda-Cuevas' case presents a perfect vehicle for this Court to address the mass confusion in the Circuits relating to the parameters of the modified categorical approach. The federal sentencing court in his case applied the modified categorical approach and considered the underlying

facts of his case to make a "crime of violence" finding under § 2L1.2, even though the Maryland assault offense at issue was not expressly divisible. Mr. Baranda-Cuevas clearly preserved this issue in district court and in the Fourth Circuit.

However, the resolution of this issue will not solely affect Mr. Baranda-Cuevas' sentence, but will clear up the mass confusion amongst the federal courts that are confronted on a daily basis with this issue in their application of a wide range of elements-driven recidivist sentencing enhancements (including ACCA, career offender, and § 2L1.2 enhancements) that call for the categorical/modified categorical approach. These enhancements commonly result in dramatic increase in defendants' sentences. Thus, it is urgent that this Court address the current chaos in the lower courts relating to the modified categorical approach.

CONCLUSION

For the foregoing reasons, Mr. Baranda-Cuevas respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,
JAMES WYDA
Federal Public Defender

_____

PARESH S. PATEL
Staff Attorney
6411 Ivy Lane, Suite 710
Greenbelt, Maryland 20770
Telephone: (301) 344-0600
Facsimile: (301) 344-0019

APPENDIX

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

MOISES BARANDA-CUEVAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of Petitioner's Petition for Writ of Certiorari was mailed first-class, postage, pre-paid this 13th day of June 2011 to: Donald Verrilli, Jr., The Solicitor General, Department of Justice, Washington, D.C. 20530. I also certify that all parties required to be served have been served.

Respectfully submitted,

JAMES WYDA,
Federal Public Defender

_____
PARESH S. PATEL
Staff Attorney
6411 Ivy Lane, Suite 710
Greenbelt, Maryland 20770
Telephone: (301) 344-0600
Facsimile: (301) 344-0019

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

MOISES BARANDA CUEVAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now the Petitioner, Moises Baranda Cuevas, through counsel, and requests that this Honorable Court allow him to proceed *in forma pauperis*. In support of this motion, Petitioner represents as follows:

1. The United States Court of Appeals for the Fourth Circuit appointed the Office of the Federal Public Defender for the District of Maryland to represent Petitioner under the provisions of 18 U.S.C. § 3006A.

2. Petitioner is currently incarcerated and without hope of funds for employing private counsel.

WHEREFORE, Petitioner, through counsel, requests that this Honorable Court allow him to proceed *in forma pauperis* and that the Office of the Federal Public Defender for the District of Maryland continue to represent him.

Respectfully submitted,

JAMES WYDA
Federal Public Defender

PARESH S. PATEL
Staff Attorney
6411 Ivy Lane, Suite 710
Greenbelt, Maryland 20770
Telephone: (301) 344-0600
Facsimile: (301) 344-0019

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion for Leave to Proceed *In Forma Pauperis* was mailed first-class, postage, pre-paid this 13th day of June 2011 to: Donald Verrilli, Jr., The Solicitor General, Department of Justice, Washington D.C. 20530. I also certify that all parties required to be served have been served.

_____
PARESH S. PATEL
Staff Attorney