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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DENNIS STRICKLAND, Defendant-Appellant.	)	U.S.C.A. No. 08-30091 D.C. No. CR-07-21-H-CCL

BRIEF IN SATISFACTION OF COURT'S APRIL 9, 2009 ORDER REGARDING NEED FOR REHEARING *EN BANC*

INTRODUCTION AND CASE STATEMENT

This is a child pornography case where appellant argued in the district court and then on appeal in this Court that his sentence was unlawfully enhanced based on his prior conviction in Maryland for child abuse. A unanimous Panel affirmed

holding that under the modified categorical approach State sex offender registration forms signed by appellant both in Washington and Montana served to clarify that appellant was convicted in Maryland, not just for child abuse, but for a crime that "relat[ed] to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." (*See* 18 U.S.C. §2252A(b)(1) and (2)). The Panel's decision is published and reported at 556 F.3d 1069 (9th Cir. January 20, 2009).

After the Panel's decision was issued appellant filed an unopposed motion to enlarge the time for filing rehearing and/or suggestion for rehearing *en banc* petitions. The motion was granted by Clerk's Order and the time for filing either or both petitions was enlarged until March 30, 2009 (Court of Appeals No. 08-30091, Docket Entry 18). On the final day of the enlarged period the undersigned filed a notice indicating that he did not intend to file any rehearing and/or *en banc* petition (Court of Appeals No. 08-30091, Doc Entry 21). Ten days after that the Panel issued the following Order:

> The parties are ordered to file briefs within 21 days addressing whether this case should be reheard en banc to determine if our disposition conflicts with *Cisneros-Perez v. Gonzales*, 465 F.3d 386 (9th Cir. 2006), or is proper under *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc), and other Ninth Circuit precedent.

This brief is intended to satisfy and comply with the Court's Order.

WHETHER THIS CASE SHOULD BE REHEARD *EN BANC* TO DETERMINE IF [THE RULING IN THIS CASE] CONFLICTS WITH *CISNEROS-PEREZ V. GONZALES*, 465 F.3d 386 (9TH CIR. 2006).

As relevant here the Court's decision in *Cisneros-Perez v. Gonzales*, 465 F.3d 386 (9th Cir. 2006) holds that when applying the modified categorical approach the court cannot "go beyond the conviction record for purposes of ascertaining the crime of which [the defendant] was convicted." 465 F.3d at 393. Moreover, the *Cisneros-Perez* Court was quick to point out that although "the *administrative* record" in that case contained an admission by the defendant that his assault victim was his wife that admission "[did] not supply the missing element either" to show that the prior crime was one of domestic violence. *Id.* 465 F.3d at 393 (emphasis original).

The Court in *Cisneros-Perez* goes on to hold that neither does the nature of the sentence imposed for the prior conviction supply the missing data concerning the nature of the conviction. 465 F.3d at 394. Judge Callahan dissented and opined that the information in the Immigration record warranted the finding that Mr. Cisneros-Perez's underlying offense was a crime of domestic violence rendering

him subject to removal under the Immigration statutes. 465 F.3d at 396.

Even at a glance it seems clear that the decision in this case conflicts with *Cisneros-Perez*. Here, the court arrived at the conclusion that appellant's Maryland conviction counts as a sentence enhancer by looking beyond what the *Cisneros-Perez* Panel labeled by turns as the "judgment record" or "conviction record." Since neither the Montana Sex Offender Registration form nor the Washington Sex Offender Registration form in appellant's case could be considered part of the judgment or conviction record the conflict between *Cisneros-Perez* and this case is manifest.

This conclusion is strengthened by the other bright line rules laid down in *Cisneros-Perez*, which hold that inferences from the judgment record and/or the nature of the sentence imposed for the prior conviction cannot be relied on to qualify a prior conviction that does not satisfy the modified categorical approach analysis. Given that there is no judgment record in appellant's case it hardly seems plausible that administrative sex offender registration forms could serve as a free standing basis to count a prior conviction under the modified categorical approach, even under a liberal reading of *Cisneros-Perez*.

WHETHER THE DECISION IN THIS CASE IS PROPER UNDER *UNITED STATES V. SNELLENBERGER*, 548 F.3d 699 (9TH CIR. 2008) (*EN BANC*), AND OTHER NINTH CIRCUIT PRECEDENT.

The manner in which the Court's order is cast presupposes (at least impliedly so) that the Court's *en banc* decision in *Snellenberger* works at cross purposes with the Panel Opinion in *Cisneros-Perez*. Appellant respectfully disagrees with that suggestion whether intended or implied. *Snellenberger* does nothing to alter the rule in *Cisneros-Perez*, which holds that application of the modified categorical approach involves examination of the judgment/conviction record. Granted, *Snellenberger* did expand the boundary of the judgment/conviction record to include consideration of a minute entry by the court clerk summarizing the nature of the charge to which the defendant pled guilty in his prior case. But *Snellenberger* left undisturbed the rule set forth in *Cisneros-Perez* that it is the prior conviction judgment/conviction record which governs when applying the modified categorical approach. Moreover, there is no inconsistency between *Cisneros-Perez* and *Snellenberger* since, even though the outcomes in those cases differ, both *Cisneros-Perez* and *Snellenberger* remain faithful to the rule announced by the Supreme Court in *Shepard v. United States*, 544 U.S. 13 (2005).

SHOULD THE COURT REHEAR THIS CASE *EN BANC*?

Under Rule 35 Fed. R. App. P. a matter may be considered *en banc* if it is necessary to secure or maintain uniformity of the Court's decisions. Inasmuch as the holding in this case represents a departure from the Supreme Court's rule in *Shepard*, which the court followed in both *Cisneros-Perez* and *Snellenberger*, *en banc* consideration is probably warranted. On the other hand, if the Court decides that *en banc* review is not appropriate appellant will likely request discretionary review by the Supreme Court by filing for a Writ of Certiorari on the ground that the decision in this case conflicts with the Supreme Court's ruling in *Shepard v. United States* 544 U.S. 13 (2005). *See* Supreme Court Rule 10(c).

The error in the Court's reasoning in this case is that it loses sight of the fact that the paramount purpose of the categorical/modified categorical approach is to avoid Sixth Amendment complications. The nature of the documentation relevant to a prior conviction must be judicial in character precisely because the question isn't whether the conduct was committed; but rather was the conviction for the conduct entered so as to activate the prior conviction exception to the *Apprendi* rule?[1]

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[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

Although it is clearly the law that prior convictions can serve as sentence enhancers without having to allege and prove them to the jury beyond a reasonable doubt, that exception is a narrow one. *See e.g. United States v. Tighe*, 266 F.3d 1187, 1194 (9th Cir. 2001) ("Thus as we read . . . *Apprendi* the 'prior conviction' exception to *Apprendi's* general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt"). Courts, like the Panel here, that are inclined to count a prior conviction to enhance a sentence on the basis of facts outside the prior conviction record tend to justify the decision exclusively on the compelling clarity of the proof under consideration showing that the prior conviction *must have been* of a particular kind or type. The operative fallacy of this reasoning is that a connection between the proof and the prior conviction record is unnecessary, since the proof's compelling nature does the probative heavy lifting. But that connection is vital and cannot be dispensed with for any reason because it serves to protect the core constitutional principle that an individual cannot be subject to an enhanced penalty based on any fact that has not been charged and proved to the jury beyond a reasonable doubt.

This principle is important here because it accentuates the fact that when deciding whether a prior conviction should qualify as a sentence enhancer under the modified categorical approach the judicial character of the proof of conviction is more important than the strength of any *post hoc* collateral evidence that the individual may have committed the act in question. Or stated another way, proof that a prior conviction was entered for a particular crime to warrant sentence enhancement presupposes that such proof played a role in the jury's verdict or the defendant's guilty plea at the time the conviction was entered. Absent that firm connection between the proof and the previous judicial process supporting the prior conviction any subsequent finding by another court about that conviction (even if based on compelling collateral evidence) violates the Sixth Amendment.

CONCLUSION

WHEREFORE, appellant offers this brief in satisfaction of the Court's April 9, 2009 Order to suggest that *en banc* consideration is appropriate in order to maintain uniformity in its own decisions and with the Supreme Court's decision in *Shepard v. United States*, 544 U.S. 13 (2005). *See,* Fed. R. App. P., Rule 35(b)(1)(A). *Cf.* United States Supreme Court Rule 10(c) stating that a case may be worthy of review if "a United States court of appeals has decided an important

question of federal law . . . in a way that conflicts with relevant decisions of [the Supreme Court]."

DATED April 29, 2009.

s/Michael Donahoe
Michael Donahoe
Senior Litigator
Counsel for Petitioner-Appellant

CERTIFICATE OF MAILING

I hereby certify that on April 29, 2009, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First Class Mail, postage prepared to the following non-CM/ECF participants.

Dennis Strickland
c/o Judy Strickland
2726 1st Avenue North
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s/Michael Donahoe

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,** **vs.** **DENNIS STRICKLAND,** **Defendant-Appellant.**	**C.A. 08-30091** **D.C. No.: CR 07-21-H-CCL**

SUPPLEMENTAL BRIEF OF APPELLEE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA HELENA DIVISION

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Introduction

There is no reasonable doubt that Dennis Strickland ("Strickland") was convicted of a sex related offense involving a minor on November 6, 2002, in Maryland. On that day he was convicted of "child abuse" which necessarily involves a minor. The court docket sheet states Strickland waived his jury trial, submitted the case on an agreed set of facts and that he "is a child sex offender." The docket also stated Strickland was required to register under Maryland "criminal procedure sec. 11-704." MD Code Ann. Crim. Proc. § 11-704 requires sex offenders and kidnapers to register with a supervising authority.

In addition to this record of Strickland's prior conviction, it is undisputed that he registered as a sex offender in both Washington and Montana. And in his Montana registration Strickland checked a box indicating his 2002 Maryland conviction was "sexual." Later, when Strickland pled guilty to receipt and possession of child pornography in this case, he agreed with the government's factual basis which included the fact that he was "a registered and prior convicted sex offender."

Because Strickland's prior offense was necessarily a sex related child abuse, both the district court and this Court concluded that his

sentence could be enhanced under 18 U.S.C. § 2252A(b)(1). Both the district court and this Court relied on the Maryland docket sheet and Strickland's admissions in the Washington and Montana sex offender registration forms which corroborate each other and the description of the Maryland offense in the Presentence Report (PSR).

This Court has now ordered further briefing to determine whether its disposition conflicts with *Cisneros-Perez v. Gonzales*, 465 F.3d 386 (9th Cir. 2006), which, *inter alia*, reiterated this Court's prohibition against relying on "extra-record of conviction evidence" in the modified categorical analysis. Or whether the disposition is proper under *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008), which held that a predicate conviction can be established by a clerk's minute order.

Since the court clerk in Maryland is required by law to make entries of all proceedings of the court, the docket sheet alone supports this Court's disposition under *Snellenberger*. *See also Anaya-Ortiz v. Mukasey*, 553 F.3d 1266, 1272-73 (9th Cir. 2009). The more difficult question is whether this Court may also rely on Strickland's admissions in "extra-record of conviction evidence."

Admittedly, the government has not found a case where this Court has permitted such extra-record admissions to be considered in the modified categorical approach. *Cisneros-Perez* and other cases make clear such evidence outside the record of conviction is not allowed to prove *underlying facts* of the prior conviction. This is because the Court would then be reviewing "conduct" of the prior offense rather than what the "conviction" was. *See Tokatly v. Ashcroft*, 371 F.3d 613, 622 (9th Cir. 2004).

And that is where this case is different. Here, in the Montana sex offender registration, and at the change of plea, Strickland admitted the *prior offense* itself was "sexual" in nature. That was not an admission of the underlying facts, but of the offense of conviction. And it simply corroborates the information in the docket sheet. Relying on such a corroborating admission of the generic crime does not offend this Court's precedent. Instead, it is an issue left open in *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003). But even if these admissions are not relied on, this Court's disposition is still proper under *Snellenberger* and the Maryland docket sheet alone.

Background

In this case Strickland pled guilty to receipt and possession of child pornography. (ER at 28). The offense was based on 1,148 images of child pornography and two dozen movies he stored on his work computer. (ER 62, 104). The PSR found that Strickland's November 2002 Maryland conviction was for child abuse of a sexual nature which subjected him to a 15 year mandatory minimum rather than 5 years for Count I. 18 U.S.C. § 2252A(b)(1); PSR ¶¶ 37, 66, 67. The PSR also recited the details of the Maryland offense. PSR 8-10.

The district court concluded that Strickland's 2002 Maryland conviction was related to sexual abuse involving a minor and applied the enhancements in § 2252A(b). The district court sentenced Strickland to 240 months. (ER 29). In reaching that conclusion, the district court first relied on the Maryland docket sheet. (ER 46-47). The docket sheet sets out six charges against Strickland in 2002 for child abuse, sexual offenses and perverted practice. It reflects that Strickland was only convicted of the child abuse offense on November 6, 2002. (ER 74-76). The docket then lists sequential entries detailing the events of the case. The entry on November 6, 2002, states that the

jury trial was waived and the case was submitted on an agreed statement of facts. In the same entry, the docket states "Registration required under criminal procedure sec. 11-704. Defendant to register DNA. Defendant is a child sex offender." (ER 77).

In addition to the docket sheet, the district court admitted Strickland's Washington and Montana sex offender registration forms. (ER 49). In the Montana form Strickland listed his November 2002 Maryland conviction. He listed the victim of that offense as his 16 year old step son. The form required Strickland to check a box designating his offense as sexual, violent or both. Strickland checked the box representing his offense was "sexual." Strickland then signed the registration form in front of a witness. (ER 87-88). Strickland's Washington form provides no representations other than the fact that he signed the sex and kidnaping offender registration notification. (ER 80-83). Based on these documents and the docket, the district court applied the sentencing enhancement. (ER 49).

On appeal, this Court affirmed the district court. *United States v. Strickland*, 556 F.3d 1069 (9th Cir. 2009). The Court first established

that the enhancement under § 2252A(b) applies to a broad array of sexual related offenses involving a minor. The offense need not be sexual abuse, but "any state offense that stands in some relation, bears upon, or is associated with that generic offense." *Id.* at 1072 (citing *United States v. Sinerius*, 504 F.3d 737, 743 (9th Cir. 2007)).

Strickland then held that the sex offender registration forms establish an admission that the Maryland conviction for child abuse was related to sexual abuse under § 2252A(b). Specifically, the Montana form admitted a sexual offense committed in Maryland in November 2002. The facts in the form were consistent with the prior offense described in the PSR and the facts in the state court docket. While the Washington form contained no representations, it was representative of Strickland's duty to register as a sex offender in Montana and Washington. *Strickland*, 556 F.3d at 1074. This Court concluded Strickland's duty to register under the state laws, and the admissions in the registration forms, showed the Maryland conviction was related to abusive sexual conduct involving a minor and the district court properly relied on them. The opinion also noted that this

conclusion is supported by Strickland's plea in this case because he agreed with the government's factual recitation that he was a registered and prior convicted sex offender. *Id.* at 1074-75.

Discussion

I. The Court's disposition is proper under *Snellenberger* because the Maryland docket alone establishes that the prior child abuse conviction related to abusive sexual conduct involving a minor.

A defendant convicted under § 2252A is subject to an enhanced penalty if he or she has a prior conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor." 18 U.S.C. § 2252A(b)(1). The statute here is unique in its breadth because defendants need not be convicted of state offenses equivalent to sexual abuse. Rather, the enhancement applies for "any state offense that stands in some relation, bears upon, or is associated with that generic offense." *Sinerius*, 504 F.3d at 743.

When a predicate offense criminalizes a broader range of conduct than the federal generic crime, the modified categorical approach allows the court to consider additional evidence to determine whether the conviction meets the federal prerequisites. The court may consider

"the terms of the charging document, to the terms of a plea agreement or transcript of colloquy . . . some comparable judicial record of this information," or a defendant's own admissions confirming the factual basis for the plea. *Shepard v. United States*, 544 U.S. 13, 25-26 (2005).

All parties agree in this case that the Maryland child abuse statute penalizes physical abuse in addition to sexual abuse, and the categorical approach is not satisfied. The question is whether there is a sufficient judicial record and cognizable admissions that Strickland pled guilty to child abuse of a sexual nature.

Cognizable facts in the judicial record of a defendant's predicate offense include documents prepared by a neutral officer of the court, such as the clerk's office. In *Snellenberger*, the defendant was charged with two counts of burglary, including one qualifying predicate offense and one not. An *en banc* panel of this Court held that a minute order from the state court clerk's office could be relied on to prove defendant pled to the qualifying offense. 548 F.3d at 701-02. The Court explained that the minute order may be relied on because it is prepared by a neutral court officer at or near the time of the guilty plea, and the clerk

is charged by law with accurately recording proceedings. *Id*. at 702.

While *Snellenberger* relied on both the charging document and minute order, this Court subsequently approved sole reliance on a clerk's entry in an abstract of judgment. In *Anaya-Ortiz v. Mukasey*, the predicate offense at issue was felon in possession of a firearm. 553 F.3d 1266 (9th Cir. 2009). Defendant's California abstract of judgment listed his crime of conviction as "possession of a firearm by a felon." This Court explained that because the abstract was prepared by a neutral court officer and could be examined and challenged, it appropriately qualified the defendant's predicate offense. *Id*. at 1272-73. Although the abstract did not state defendant was guilty of the offense charged in the Information, the Court held that the clerk's entry in the abstract sufficiently established the generic offense by itself. *Id*. at 1273.

Here, the docket entry in Strickland's Maryland case establishes his predicate conviction because it proves he pled to a sex related child abuse and was prepared by a neutral clerk. As explained above, the Maryland docket sets forth all the charges against Strickland and

states that he pled guilty to child abuse, although he was charged with other sex-related offenses. The November 6, 2002, entry states that he is required to register under "criminal procedure sec. 11-704" and "Defendant is a child sex offender." (ER 77). This establishes with "reasonable certainty," as required by *Snellenberger*, that Strickland's child abuse was "related to" abusive sexual conduct as required to enhance his sentence under § 2252A(b).

If Strickland had been convicted of non-sexual physical child abuse, there would be no reason for the docket to state that he is a "child sex offender," and he would not be required to register under MD Code Ann. Crim. Proc. § 11-704. In fact, § 11-704(a) specifies that a "child sexual offender" must register. So when read as a whole, the docket requires registration under Maryland law and specifies the type of offender Strickland is under § 11-704(a). Registration under this section applies only to a variety of sex related offenses, kidnaping and false imprisonment of a person under 18 years old. *Compare* MD Code Ann. Crim. Proc. § 11-704 and § 11-701(h) (defining an "offender"). Since Strickland was not convicted of kidnaping or false imprisonment,

his child abuse offense was necessarily sex related for him to register under § 11-704.

The Maryland docket is a reliable judicial record because the docket summarizes proceedings, is used as the commitment order and can be corrected. Under MD Code Ann. Cts. & Jud. Proc. § 2-201, the court clerk is required to "make proper legible entries of all proceedings of the court." The Maryland Rules of Criminal Causes require a docket entry of the conviction and sentence when a defendant is committed for imprisonment. MD R CR Rule 4-351. Under Maryland case law, a docket entry is sufficient proof of a prior offense. *Holiday News, Mtd. v. Maryland*, 453 A.2d 151, 157 (Md. Ct. Spec. App. 1982). Maryland courts have emphasized the importance of reviewing transcripts and dockets because they can be corrected. *See, e.g.*, *Dutton v. Maryland*, 862 A.2d 1075, 1082 (Md. Ct. Spec. App. 2004) (collecting cases).

In sum, similar to *Anaya-Ortiz*, the clerk's docket entry in this case establishes the generic federal offense by itself. The docket is prepared by a neutral officer of the court tasked with making a record of court proceedings, and Strickland had the right to examine and

challenge its content. Since he did not challenge the docket, this Court and the district court can rely on the fact that it evidences the sexual nature of Strickland's conviction for child abuse. This is squarely in line with *Snellenberger*.

Relying on the docket sheet alone creates no conflict with *Cisneros-Perez v. Gonzales*, 465 F.3d 386 (9th Cir. 2006). The government acknowledges that *Cisneros-Perez* found that a sentence of domestic violence counseling was not enough evidence to establish that the offense had a "domestic" element. But as explained above, the sex offender registration in § 11-704 is only applicable to certain types of offenders. Under the circumstances of this case, the registration could only be for a sex related child abuse. And the docket further states that Strickland is a child sex offender. This evidence proves Strickland's conviction necessarily related to a child sex offense.

II. This Court is not prohibited from relying on admissions of the prior conviction itself when they corroborate the state record of conviction.

Under the modified categorical approach a court may only "look to the record of conviction" to determine whether the underlying facts of a

predicate offense establish the generic federal crime. *Cisneros-Perez* reiterated this holding, and declined "'to modify this court's . . . strict rules against extra-record of conviction evidence in order to authorize use of an alien's admissions in determining' whether he has been convicted of a crime of domestic violence." 465 F.3d at 393 (quoting *Tokatly v. Ashcroft*, 371 F.3d 613, 623 (9th Cir. 2004)).

But it appears that there remains an open question as to whether an "extra-record" admission by the defendant may be relied on where it admits and corroborates the requisite generic offense itself rather than just the underlying facts. *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003). The government acknowledges that after *Tokatly* and *Cisneros-Perez*, there is very little room (if any) to rely on extra-record evidence. And some of this Court's reliance on extra-record facts in *Strickland* may not be permissible. But where, as here, a defendant makes admissions that a previous conviction is sex related, the Court should not be required to ignore a record of uncontested admissions.

In *Cisneros-Perez*, the issue was whether the petitioner had previously been convicted of a "domestic violence" offense when he pled

no contest to simple battery. As part of his sentence, petitioner was ordered to undergo domestic violence counseling, and stay away from his wife. He admitted in the immigration proceeding that the victim in the dismissed counts was his wife, although the battery he pled guilty to did not list a victim. This Court held that the admission in the immigration proceeding could not be considered because it was extra-record evidence of underlying facts. *Cisneroz-Perez*, 465 F.3d at 393. The Court also held other evidence was insufficient to establish a domestic violence offense because domestic violence counseling could be ordered regardless of the offense of conviction. *Id*. at 393.

In rejecting the immigration court admission, *Cisneros-Perez* relied on *Tokatly* for the proposition that admissions outside the record of the state conviction could not be used. *Tokatly* explained that the problem with relying on extra-record evidence is that courts are tasked with determining the nature of the "conviction" under the modified categorical approach – not whether the facts would establish some other crime. Looking to underlying facts in later admissions would "require us to look to 'conduct' rather than 'conviction.'" *Tokatly*, 371

F.3d at 622. *Tokatly* refused to consider judicial admissions outside the record of conviction because considering other facts could resort to mini-trials "wholly inappropriate in this context." *Id.* at 621.

In *Huerta-Guevara*, this Court reached the same conclusion as *Tokatly*. The issue there was whether a petitioner had been convicted of the generic elements of a "theft offense." In the immigration appeal the petitioner admitted to conduct sufficient to prove a theft offense, but this Court refused to consider the extra-record admission to the underlying facts of the prior offense. *Huerta-Guevara*, 321 F.3d at 888.

In reaching that conclusion, *Huerta-Guevara* explained that judicial admissions normally bind a party and are arguably the type of documentation a court may consider using the modified categorical approach. *Id.* This Court refused to decide whether judicial admissions could ever be used because in *Huerta-Guevara* it was not clear that the petitioner's admissions were elements to which she pled guilty. Instead, the admissions were simply the bare facts. *Id.*

Here, Strickland's admissions were not just the bare facts of his prior Maryland offense. In the Montana sex offender registration form

Strickland could designate his prior conviction as sexual, violent or both. He checked the box that represented his *conviction* as "sexual." He also filled out a Washington sex offender registration form that was required by law for previously convicted sex offenders. And he later agreed with the government's factual recitation in this case that he was a previously convicted sex offender.

These representations do not delve into the underlying facts of Strickland's previous conviction, but admit to the nature of the conviction itself. For these reasons, reliance on admissions as to the nature of the "conviction," not "conduct" does not necessarily run afoul of *Cisneros-Perez* or *Tokatly*, and fills the open question left by *Huerta-Guevara*. The distinction in this case is that the predicate offense is uniquely broad and covers any "sex related" offense involving a minor, so Strickland need not admit a specific element per se. Strickland's admissions also corroborate the state docket entry that evidences the sexual nature of his conviction. *See United States v. Franklin*, 235 F.3d 1165, 1172 (9th Cir. 2000) (explaining that "in some cases a sentencing court properly might cumulate documentation of prior criminal

convictions to find that such documentation 'clearly establishes' a prior criminal conviction.").

Courts should be able to rely on these types of admissions because if a defendant admits the prior offense was sex related there is no danger of "mini-trials" over the nature of the uncontested predicate offense. In this case, for instance, Strickland has never claimed that his Maryland conviction is not an offense relating to abusive sexual conduct with a minor. Nor could he since he signed a Montana sex offender registration form that represented the Maryland offense was sexual in nature, and later agreed with the government that he was a previously convicted sex offender. Strickland is merely claiming the government does not have appropriate documents to prove it was a sex related offense.

In a case where the defendant has made admissions as to the very nature of the predicate offense itself, does not contest the nature of that conviction, and it is corroborated by the record of that conviction, courts should not be required to turn a blind eye to the plain facts.

Based on these distinctions, to the extent this Court's opinion in *Strickland* relied on information in the Montana sex offender

registration and PSR to prove the underlying facts of the Maryland conviction, it may run afoul of *Cisneros-Perez* and *Tokatly*. But to the extent it relied on the sexual offender registration forms as admissions that the child abuse was in fact a sex related offense, corroborating the evidence in the state judicial record, there is no actual conflict with this Court's prior precedent.

Conclusion

The Maryland docket sheet alone provides sufficient evidence for the enhancement under *Snellenberger*. It should not matter, and it did not offend prior precedent, that the panel emphasized "extra-record of conviction" facts more than necessary. These matters were merely corroborative of the judicial record. The sentencing enhancement should be affirmed.

DATED this 30th of April, 2009.

WILLIAM W. MERCER
United States Attorney

_/s/ Ryan M. Archer_____
RYAN M. ARCHER
Assistant U.S. Attorney
Attorney for Plaintiff

Certificate of Service

I hereby certify that on April 30, 2009, I electronically filed the foregoing with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

_/s/ Ryan M. Archer_____
RYAN M. ARCHER
Assistant U.S. Attorney
Attorney for Appellee

Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 3396 words.

WILLIAM W. MERCER
United States Attorney

__/s/ Ryan M. Archer_____
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