No. 11-9540

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW ROBERT DESCAMPS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the courts below correctly applied a modified categorical approach in concluding that petitioner's prior California conviction for burglary was a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. 924(e).

2. Whether this Court should overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998).

IN THE SUPREME COURT OF THE UNITED STATES

No. 11-9540

MATTHEW ROBERT DESCAMPS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2012. The petition for a writ of certiorari was filed on March 19, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, petitioner was convicted of

being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), to 262 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1-5.

1. On March 25, 2005, the Stevens County, Washington, Sheriff's Dispatch received a 911 call reporting that petitioner had fired a handgun at another person. Presentence Investigation Report (PSR) ¶ 13. Police responded and saw petitioner driving from the scene. After a high-speed chase, petitioner ran from his vehicle into a bus that was being used as a residence, carrying a black coat. Petitioner emerged from the bus about ten seconds later, without the coat. Petitioner was arrested. PSR ¶ 14. A search of the bus found, inside the coat petitioner had carried into the bus, a loaded .32 caliber revolver loaded with one fired casing and four live bullets. PSR ¶ 15.

2. A grand jury charged petitioner with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 924(e). After a jury trial, petitioner was convicted of that offense.

The PSR recommended that petitioner be sentenced under the ACCA, which, as relevant here, provides for an increased sentence for a person who violates 18 U.S.C. 922(g) and has three previous convictions "for a violent felony," 18 U.S.C. 924(e)(1), defined as

"any crime punishable by imprisonment for a term exceeding one year * * * that -- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). The PSR found that provision to apply because petitioner had at least three prior felony convictions that qualified as violent felonies, including California convictions for robbery and second degree burglary and a Washington conviction for felony harassment. PSR ¶¶ 52, 66, 71, 103.

The parties agreed that petitioner's robbery conviction qualified as a violent felony under ACCA, but petitioner challenged whether his burglary and felony-harassment convictions qualified as ACCA predicate offenses. See Pet. App. 3. The definition of "violent felony" specifically includes "burglary." 18 U.S.C. 924(e)(2)(B)(ii). In Taylor v. United States, 495 U.S. 575 (1990), this Court held "that a person has been convicted of burglary for purposes of a [Section] 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Id. at 599. If a state statute contains both this generic burglary offense and another offense that does not meet these elements, such

as where a burglary statute includes entry into places other than buildings like "automobiles and vending machines," then the court must employ a modified categorical approach to determine whether a defendant was convicted of a generic burglary offense. Id. at 599-602. In making this determination, a court may look to the charging documents, the jury instructions, the terms of the plea agreement, the transcript of the plea colloquy confirming the factual basis for the plea, or other comparable judicial records. See Shepard v. United States, 544 U.S. 13, 26 (2005); Taylor, 495 U.S. at 602.

The California statute under which petitioner had been convicted provides that "[e]very person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, [or] vessel * * * with intent to commit grand or petit larceny or any felony is guilty of burglary." Cal. Penal Code § 459 (West 1978); see Pet. App. 3. The district court found that petitioner's prior conviction for burglary under this statute satisfied the ACCA definition of "violent felony" as interpreted by Taylor. Id. at 7-9. The court noted that the criminal information to which petitioner pleaded guilty charged that he unlawfully entered "CentroMart" with "the intent to commit theft therein." Id. at 9; see id. at 30 (criminal information). The court further relied on the transcript of the change-of-plea hearing, during which the prosecutor stated, without

objection by petitioner, that the factual basis for the offense "involve[d] the breaking and entering of a grocery store." Id. at 9 & n. 1; see id. at 40 (plea hearing transcript).

The district court also found that petitioner's prior offense of felony harassment qualified as a violent felony. Pet. App. 11-12. The criminal information to which petitioner pleaded guilty in that case charged petitioner with threatening to kill a judge. Id. at 12. The court found that such an offense involves the "threatened use of physical force against the person of another" and therefore was also a "violent felony." Ibid. (citing 18 U.S.C. 924(e)(2)(B)(i)).

The district court found that petitioner's advisory sentencing range, enhanced because of the application of the ACCA, was 262 to 327 months of imprisonment. Pet. App. 12-14. The court sentenced petitioner to 262 months of imprisonment to be followed by five years of supervised release. Judgment 1-2.

3. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1-5. As relevant here, applying this Court's decision in Almendarez–Torres v. United States, 523 U.S. 224, 226–227 (1998), the court rejected petitioner's contention that the fact of a prior conviction that is used to increase the maximum term of imprisonment to which the defendant is subject must be charged in the indictment and admitted by the

defendant or submitted to a jury for a finding beyond a reasonable doubt. Pet. App. 2-3.

The court of appeals also rejected petitioner's contention that his California burglary conviction did not qualify as a violent felony. Pet. App. 3-4. Recognizing that the California statute at issue encompassed conduct that would not qualify as a "burglary" as defined by Taylor, the court applied the modified categorical approach of Shepard. Ibid. It found that the change-of-plea transcript in the case clarified that the CentroMart identified in the criminal information that was entered by petitioner with the intent to commit theft was a grocery store and therefore was a qualifying building under Taylor. Id. at 4. The court rejected "as fanciful" petitioner's argument that it might have been a "tent," not a building, and therefore his crime might have been outside Taylor's definition of burglary. Ibid. The court also explained that petitioner's plea colloquy "establishe[d] that [petitioner] [entered the store] in an unlawful way (by 'breaking and entering') in the generic sense." Ibid.

ARGUMENT

Petitioner contends (Pet. 8-13) that the court of appeals erred in applying the modified categorical approach to determine whether his prior offense was "burglary" within the ACCA's definition of "violent felony" because the California burglary statute does not consist of discrete subsections, some of which

qualify as "burglary" and some of which do not. He also states (Pet. 13-21) that the court of appeals' application of the modified categorical approach here implicates a division of authority among the courts of appeals. The Ninth Circuit correctly applied a modified categorical approach here. Although lower courts have taken different approaches to when a modified categorical approach may be used, that disagreement predates the en banc Ninth Circuit's recent comprehensive decision on the issue in United States v. Aguila-Montes de Oca, 655 F.3d 915 (2011), and few other courts have devoted sustained attention to the question. This Court's intervention would be premature at this time. The Court has very recently denied several petitions raising identical or similar questions in the wake of Aguila-Montes, and there is no reason for a different result here. See Randolph v. United States, No. 11-8135 (May 29, 2012); Fischer v. United States, 132 S. Ct. 1857 (2012) (No. 11-662); Baranda-Cuevas v. United States, 132 S. Ct. 755 (2011) (No. 10-11004); Alvarez-Cordova v. United States, 132 S. Ct. 574 (2011) (No. 10-10777). As for petitioner's other contentions, his argument (Pet. 21-23) that the records of his prior burglary conviction in particular did not sufficiently show that he unlawfully entered a building with the intent to commit a felony is factbound, and this Court has repeatedly denied petitions contending, as petitioner does (Pet. 24-25), that Almendarez–Torres

v. United States, 523 U.S. 224, 226–227 (1998), should be overruled. Further review is not warranted.

1. a. Under the ACCA a "crime punishable by imprisonment for a term exceeding one year" is a "violent felony" if the offense "is burglary." See 18 U.S.C. 924(e)(2)(B)(ii). In Taylor v. United States, 495 U.S. 575 (1990), this Court held that a crime is burglary for purposes of the ACCA if it has the "basic elements" of the generic crime of burglary, which are the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Id. at 599. As this Court explained in Shepard v. United States, 544 U.S. 13 (2005), the statute "makes burglary a violent felony only if committed in a building or enclosed space * * * , not in a boat or motor vehicle." Id. at 15-16. When a defendant is convicted of "burglary" in a State with a burglary statute (like the California statute at issue here) that embraces both this generic burglary offense and another offense that does not meet these elements, then a court must employ a modified categorical approach to determine whether the defendant was convicted of a generic burglary offense. See Taylor, 495 U.S. at 599-602. In making this determination, a court may look to the charging documents, jury instructions, the terms of a plea agreement, the transcript of a plea colloquy confirming the factual basis for the plea, or other comparable judicial records. See Shepard, 544 U.S. at 26; Taylor, 495 U.S. at

602. The government has the burden of proving the existence of a qualifying prior conviction by a preponderance of the evidence. See United States v. O'Brien, 130 S. Ct. 2169, 2174 (2010); Almendarez-Torres, 523 U.S. at 228, 230. The court of appeals applied the modified categorical approach to determine whether petitioner's California burglary conviction was for "burglary" under the ACCA, as defined in Taylor.

b. Petitioner contends (Pet. 8-13) that the decision below is inconsistent with this Court's precedent, which in petitioner's view limits application of the modified categorical approach to so-called "divisible" statutes, which are statutes that expressly delineate alternative elements or combinations of elements that suffice to establish guilt of the offense, some of which constitute a violent felony and some of which do not.

This Court's decisions clearly permit use of a modified categorical approach in the context of divisible statutes. See, e.g., Johnson, 130 S. Ct. at 1273 (noting that the Court's decisions "permit[]" use of a modified categorical approach when a defendant has been convicted under a law that "contains statutory phrases that cover several different generic crimes * * * to determine which statutory phrase was the basis for the conviction"). Petitioner contends (Pet. 10-12, 17) that isolated statements in Johnson, Nijhawan v. Holder, 129 S. Ct. 2294 (2009), and Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007), amount to

holdings that the modified categorical approach cannot be used outside the context of a divisible statute. But the statements to which petitioner refers are merely descriptive of this Court's approach to statutes it has actually analyzed; the Court has never limited the modified categorical approach to divisible statutes. See Aguila-Montes, 655 F.3d at 924, 931.

In Taylor itself, this Court illustrated the use of the modified categorical approach with an example of a state statute that defined the offense of burglary more broadly than the elements of the generic, federal definition. 495 U.S. at 602. The Court explained that "if the indictment or information and jury instructions show that the defendant was charged only with" the elements of the generic, federal crime, and "that the jury necessarily had to find [those elements] to convict," then the offense qualifies as generic "burglary" within the meaning of federal law. Ibid. Such an approach is not "fact-based" in the way petitioner contends (Pet. 10), but instead rests on judicial records establishing the elements charged and admitted to by the defendant or found by a jury. Accordingly, the courts below appropriately consulted the judicial records they did to determine whether petitioner pleaded guilty to generic burglary. See Aguila-Montes, 655 F.3d at 936-937.

c. As petitioner correctly notes (Pet. 14-21), the courts of appeals have not taken consistent approaches to question whether

the modified categorical approach is limited to divisible statutes. See Aguila-Montes, 655 F.3d at 931 (describing the state of the law in the courts of appeals as "a bit of a jumble"). Few courts, however, have devoted sustained attention to the question, and no developed conflict warrants this Court's intervention at this time.

As an initial matter, only a few courts appear to have limited the modified categorical approach to the class of statutes that petitioner labels as divisible. See United States v. Woods, 576 F.3d 400, 406-407 (7th Cir. 2009); United States v. Gonzalez-Terrazas, 529 F.3d 293, 297-298 (5th Cir. 2008). But see Aguila-Montes, 655 F.3d at 932 (explaining that the "Seventh Circuit has recently refined its course" and that it is now "less clear that the court has converged on a divisible-statutes-only rule") (citing United States v. Fife, 624 F.3d 441, 644 (7th Cir. 2010), cert. denied, 131 S. Ct. 1536 (2011)). The Eighth Circuit has stated that the modified categorical approach should be applied "only to determine which part of the statute the defendant violated," United States v. Boaz, 558 F.3d 800, 808 (2009) (quoting United States v. Howell, 531 F.3d 621, 622-623 (8th Cir. 2008)), but it has not consistently followed that prescription, see, e.g., United States v. Medina-Valencia, 538 F.3d 831, 835 (8th Cir.) (using fact admitted in plea agreement to conclude that the defendant's particular violation of Tex. Penal Code Ann.

§ 21.11(a)(1) (Vernon 1990) was "sexual abuse of a minor" under the Sentencing Guidelines), cert. denied, 555 U.S. 1079 (2008).

Other circuits have characterized the modified categorical approach as generally appropriate when a statute's language encompasses different combinations of elements, only some of which would qualify as the generic crime defined in a federal statute or the Sentencing Guidelines. See, e.g., Gor v. Holder, 607 F.3d 180, 192 (6th Cir. 2010) (dicta), cert. denied, 131 S. Ct. 3058 (2011); Nijhawan v. Attorney Gen., 523 F.3d 387, 393 (3d Cir. 2008) (dicta noting that cases applying the modified categorical approach "generally involve" divisible statutes), aff'd, 557 U.S. 29 (2009); James v. Mukasey, 522 F.3d 250, 254, 256 (2d Cir. 2008); see also, e.g., Accardo v. United States Att'y Gen., 634 F.3d 1333, 1336 (11th Cir. 2011); United States v. Soto-Sanchez, 623 F.3d 317, 320 (6th Cir. 2010). But those courts have drawn their general descriptions from previous decisions explaining the modified categorical approach in general terms and have not provided reasons that would support petitioner's proposed limitation of the categorical approach to divisibile statutes.

Moreover, those courts that have suggested a divisibility limitation have not articulated a consistent definition of such a limitation. Some courts have suggested that the formal structure of the statute may determine whether it is susceptible to the modified categorical approach, see United States v. Brown, 631 F.3d

573, 577-578 (1st Cir. 2011) (additionally noting that nothing suggests that "such a subdivision" has been imported by "judicial construction"); Lanferman v. BIA, 576 F.3d 84, 90 (2d Cir. 2009) (adding that "the exact parameters of the divisibility inquiry have not been determined" by the Second Circuit), while others have held that "the presence or absence of numbered subdivisions" does not control, so long as the statute "creates multiple offense categories" or "multiple modes of commission," Fife, 624 F.3d at 446; see Oouch v. DHS, 633 F.3d 119, 122 & n.4 (2d Cir. 2011) (noting that Second Circuit has "discussed three potential approaches" for deciding whether a statute is divisible, "without selecting one").

If the different standards articulated by the courts of appeals persist and have practical significance, this Court's review may be warranted in the future in an appropriate case. But such review would be premature at this time. Significantly, the court of appeals decisions to which petitioner points were decided before the Ninth Circuit's en banc decision in Aguila-Montes (issued Aug. 11, 2011). In Aguila-Montes, the Ninth Circuit overruled its prior case law precluding application of the modified categorical approach "[w]hen the crime of conviction is missing an element of the generic crime altogether." 655 F.3d at 917 (quoting Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1073 (9th Cir. 2007)). After reviewing in detail this Court's precedents and surveying

case law from other circuits, see id. at 931-935, the court held that, when the statute at issue "is categorically broader than the generic offense," courts may apply a modified categorical approach by consulting "judicially noticeable documents" to determine "(1) what facts the conviction necessarily rested on (that is, what facts the trier of fact was actually required to find); and (2) whether these facts satisfy the elements of the generic offense," id. at 940. See also id. at 927 (noting that divisible statutes, which explicitly list alternative bases for conviction, are not "meaningfully different" from non-divisible statutes; a statute that proscribes "harmful contact" is "indistinct from a list of all the possible ways an individual can commit harmful contact ('harmful contact with a vehicle, harmful contact with a gun, harmful contact with an axe, harmful contact with a utensil' and so on.)").

Aguila-Montes clarifies the proper application of the modified categorical approach and is likely to foster further development of the law. For example, the Tenth Circuit has since agreed with the Ninth Circuit's approach in a case, like petitioner's, that implicated a generic offense, even though earlier statements from the Tenth Circuit (on which petitioner relies, see Pet. 19) suggest a different approach in cases not implicating a generic offense. Compare United States v. Venzor-Granillo, 668 F.3d 1224, 1231 (10th Cir. 2012) (following Aguila-Montes), with United States v. Zuniga-

Soto, 527 F.3d 1110, 1118, 1122 (10th Cir. 2008) (stating that a "court may consult judicial records only for the purpose of determining which portion of a statute was charged against the defendant" to decide whether the defendant "has been convicted of a felony 'that has as an element the use . . . of physical force,'" U.S.S.G. § 2L1.2 comment. n.1(B)(iii), though ultimately consulting those records and finding "no evidence that [the defendant] was convicted under a part of the [state law] that [qualified as a crime of violence]"). Further consideration in the courts of appeals is therefore appropriate.

d. Petitioner also asks (Pet. 21-23) this Court to review the factbound question whether the transcript of the change-of-plea hearing permitted the district court to conclude by a preponderance of the evidence that petitioner's prior California conviction was for entry of a building to commit theft, rather than, for example, entry of a tent. Further review of that case-specific question is unwarranted. See Sup. Ct. R. 10; Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 841 (1996) (explaining that this Court ordinarily does not review factual findings on which the two lower courts agree). The criminal information to which petitioner pleaded guilty charged that he unlawfully entered "CentroMart" with "the intent to commit theft therein." Pet. App. 9; id. at 30 (criminal information). The district court relied on the transcript of the change-of-plea hearing, during which the prosecutor stated, without

objection by petitioner, that the offense "involve[d] the breaking and entering of a grocery store." Id. at 9 & n.1 (brackets in original); id. at 40 (plea hearing transcript). Petitioner does not contest that both those sources of information were permissibly consulted under the modified categorical approach. They provided sufficient evidence to support the district court's conclusion that petitioner was convicted of unlawfully entering a building to commit theft, and thus that he committed burglary within the meaning of the ACCA definition of violent felony.

2. Petitioner also contends (Pet. 24-26) that this Court should overrule Almendarez-Torres, supra, which held that the fact of a prior conviction used to increase the maximum term of imprisonment that may be imposed on a defendant may be found by the sentencing judge by a preponderance of the evidence and need not be alleged in the indictment or proved to a jury beyond a reasonable doubt. There is no warrant for reconsidering that rule. In keeping with Almendarez-Torres, this Court held in Apprendi v. New Jersey, 530 U.S. 466 (2000), that the Sixth Amendment requires any fact "[o]ther than the fact of a prior conviction" to be submitted to a jury, and proved beyond a reasonable doubt (or admitted by the defendant), when it increases the penalty for a crime beyond the prescribed statutory maximum. Id. at 490. This Court has since repeatedly affirmed that the Sixth Amendment rule announced in Apprendi applies only to penalty-enhancing facts "other than the

fact of a prior conviction." Southern Union Co. v. United States, No. 11-94 (June 21, 2012), slip op. 1; see Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2581 n.3 (2010); James v. United States, 550 U.S. 192, 214 n.8 (2007); Cunningham v. California, 549 U.S. 270, 274-275 (2007); United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301-302 (2004); Dretke v. Haley, 541 U.S. 386, 395-396 (2004).

This Court has repeatedly denied petitions for writs of certiorari urging that Almendarez-Torres be overruled. See, e.g., Rangel-Reyes v. United States, 547 U.S. 1200, 1201-1202 (2006) (Stevens, J., respecting the denial of certiorari) ("The doctrine of stare decisis provides a sufficient basis for the denial of certiorari in these cases.") (Nos. 05- 10706, 05-10743, 05-10815); Washington v. United States, 131 S. Ct. 137 (2010) (No. 09-11080); Zavala-Alonso v. United States, 131 S. Ct. 186 (2010) (No. 09-11372); Stanley v. United States, 555 U.S. 1104 (2009) (No. 08-6271); Weiland v. United States, 555 U.S. 1104 (2009) (No. 08-6158); Lopez-Velasquez v. United States, 555 U.S. 1050 (2008) (No. 08-5514); Polino-Mercedes v. United States, 555 U.S. 997 (2008) (No. 08-5040); Henderson v. United States, 553 U.S. 1006 (2008) (No. 07-7837); Solis-Alvarez v. United States, 552 U.S. 1188 (2008) (No. 07- 6009). The same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LANNY A. BREUER
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

JUNE 2012