No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MATTHEW ROBERT DESCAMPS,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS- NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

The California Burglary Statute Section 459 does not require as an element that a burglar "enter or remain unlawfully in a building". The Ninth Circuit held that it could determine whether this "missing element" was shown to have been proven by applying the modified categorical approach.

The issues presented are as follows:

1- Whether the Ninth Circuit's ruling in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011), (*En Banc)* that a state conviction for burglary where the statute is missing an element of the generic crime, may be subject to the modified categorical approach, even though most other Circuit Courts of Appeal would not allow it.

2- Whether is it time for this Court to overrule *Almandez-Torres v. United States,* 523 U.S. 224 (1998), apply *Apprendi v. New Jersey*, 530 U.S. 224 (2000), and require an Indictment and trial on the issue of application of the Armed Career Criminal Act.

3- Whether the Ninth Circuit's ruling in the instant case was in derogation of the requirements in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005).

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IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW ROBERT DESCAMPS

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent

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

Petitioner. Matthew Robert Descamps, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Ninth Circuit, in an unpublished decision, affirmed Petitioner's conviction and sentence for Felon in Possession of a Firearm/Ammunition, in violation of 18 U. S. C. Section 922(g)(1). The opinion of the United States Court of Appeals appears at Appendix "A" to the Petition and is unpublished.

The opinion of the United States District Court appears at Appendix "B" to the Petition and is unpublished.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals for the Ninth Circuit decided and affirmed the District Court in Petitioner's case was January 10th, 2012. The Court of Appeals had jurisdiction pursuant to 28 U. S. C. Section 1291. No petition for rehearing was filed in this case. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Const. amend. V;

U. S. Const. amend. VI;

FEDERAL STATUTES

8 U.S.C. § 1326(b)(2);

8 U.S.C. §§ 1101(a)(43);

8 U.S.C. §§ 1227(a)(2)(A)(iii);

18 U. S. C. Section 922(g)(1);

18 U. S. C. Section 924(e)(2)(B);

18 U. S. C. Section 924(e)(2)(B)(i);

18 U.S.C. § 924(e);

28 U. S. C. Section 1291;

28 U. S. C. Section 1254(1);

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8 C.F.R. § 212.2(a);

U.S.S.G. § 4B1.1;

U.S.S.G. § 2L1.2(b)(1)(A);

STATE STATUTES

Cal. Penal Code Sect. 459;

(For text of the cited provisions, see Appendix C (Sup. Ct. R. 14.1(f) & (i)(v)).

STATEMENT OF THE CASE

The Defendant was arraigned on May 16th, 2005 and entered a not guilty plea to an Indictment charging him with Count I: Felon in Possession of a Firearm/Ammunition, in violation of 18 U. S. C. §922(g)(1). [CR 16; CR 18-Minute entry). After incompetency proceedings, and an interlocutory appeal, on April 26th, 2007, the court entered an Order finding the defendant competent to stand trial. (CR 237). On December 19th, 2005, the government filed a document entitled: "Information to Establish Prior Convictions". [CR 96, ER 33-34]. Based upon the aforementioned Information, the Government manifested its intention to pursue a sentencing enhancement based upon the Armed Career Criminal Act, "ACCA") 18 U.S.C. § 924(e). The defendant proceeded to a jury trial and was convicted, as charged, on September 13th, 2007. (CR 352-Jury Verdict). The Pre-sentence Investigation Report included a recommendation for a sentencing enhancement under § 924(e)(1). On December 28th, 2007, the Government submitted its Notice of Review of the Pre-Sentence Investigation Report and Memorandum in Support of Armed Career Criminal Application [CR 403], together with attached exhibits. The Defendant objected to application of the Armed Career Criminal Act in his Defendant's Objections to Pre-Sentence Report and Sentencing Memorandum, filed on December 27th, 2007. [CR 402].

On January 4th, 2008, the court found that the defendant was an Armed Career Criminal under Sect. 924(e)(1), and Findings and Conclusions were filed on January 9th, 2008. [CR 406-Appendix B-pages 6-14]. The district court sentenced the Defendant to 262 months on Count 1, within the guideline range as calculated, along with 5 years of Supervised Release, among other conditions. The Judgment and Sentence was filed on January 14th, 2008. [CR 407, ER 10-15]. The defendant filed an appeal. [CR 354-by defendant; CR 405- by defense counsel; ER 85-94].

At the time of sentencing, the defendant argued that it would violate his constitutional rights (Fifth and Sixth Amendment) under the United States Constitution to proceed with the Armed Career Criminal Act sentencing, unless, and until, he was Indicted and the charge proven to a jury, beyond a reasonable doubt, as to whether his prior convictions counted as predicate felony convictions. In addition he argued that this objection took place at sentencing. [Transcript of Sentencing- CR 426, p. 4; ER 16-30].

Furthermore, the defendant argued that the government could not prove that the two Third Degree Assault charges, the Second Degree Burglary, or the Felony Harassment charges qualified as predicate felonies, thus, there would then have been only one qualifying conviction and the Armed Career Criminal Act would not be applicable to the defendant. [CR 426, ER 16-30].

On January 4th, 2008, the Court held a sentencing hearing. The government proffered exhibits in support of the contention that ACCA should be applied. Exhibits B-1 to B-4 were included below as ER (Excerpt of Record- 35-57, and concerned a Burglary conviction filed on December 4th, 1978, in California. (Appendix "D" herein- App. 29-51); Exhibits E-1 to E-3 were included below as ER 58-84, and concerned a felony harassment conviction filed on December 5th, 2000, in Pend Oreille County, Washington. The Government and United States Probation alleged that the Defendant was an Armed Career Criminal based on the following guilty plea convictions. First Degree Robbery October, 1977 (California) (Exhibits A1 through A4- CR 403); Second Degree Burglary-1978 (California) (Exhibits B-1 through B-4- CR 403)(Appendix "D" herein- App. 29-51); Felony Harassment, March, 2000- Pend Oreille County, WA (Exhibits E-1 through E-3); Third Degree Assault-October, 1991- Stevens County, WA

(Exhibits C-1 through C-4-CR 403); Third Degree Assault-November, 1998- Spokane County, WA (jury verdict)(Exhibits D-1 through D-4, CR 403).

The Defendant objected to the ACCA enhancement based upon the aforementioned convictions, specifically, to the convictions obtained by plea agreement for Burglary in the Second Degree in California in 1978, both Third Degree Assault convictions, and the Felony Harassment conviction. The Court ruled that the two Third Degree Assault convictions did not count as violent felonies under ACCA, but the parties agreed that the Robbery conviction counted. The major issue presented was whether the California Burglary and/or the conviction for Felony Harassment should be counted under ACCA. The court held that they both did count and with the Robbery conviction found that ACCA applied. (CR 406; Appendix B- App. 6-14).

Furthermore, the defendant argued that the Second Degree Burglary conviction from California should not qualify as a predicate conviction due to the lack of evidence to establish that the conviction involved generic Burglary. The court ruled against the defendant on this issue both orally and in the Judgment and Sentence with findings related to the Pre-Sentence report and objections thereto. (CR 406; App. B- pages 6-14; Appendix C- App. 15-28) Furthermore, the Court ruled that there was no need for a jury to determine the facts related to the convictions being used to establish ACCA qualification. (CR 406; App. 15-28).

On January 10th, 2012, the Ninth Circuit Court of Appeals filed an opinion affirming Petitioner's conviction and sentence. (Appendix A). On March 9th, 2009, the Petitioner had filed a supplemental letter briefing and specifically argued that the fact that the California Burglary Code Sect. 459 did not include the element of entering or remaining unlawfully resulted in it not qualifying as a predicate offense under ACCA since it did not meet the

definition of generic burglary and that the previous ruling in *United States v. Aguila-Montes*, No. 05-50170, ___ F.3d ___, 2009 WL 115727 (January 20th, 2009), precluded use of the California burglary conviction). (Docket Entry: 6838115- Ninth Circuit Court of Appeals), reversed, *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011), *En Banc*. The Court applied *Aguila-Montes* to Petitioner's case, even though the Burglary charge was indivisible due to missing an element of the generic crime. In addition, the Court held that an Indictment and trial were not required either as to application of the Armed Career Criminal Act.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case warrants review by the Court for several reasons. First, the Court of Appeals held it was proper for it to analyze Mr. Descamp's prior state conviction under the second-stage, or modified categorical approach of *Taylor* to determine the categorical status of the conviction. It so held, even though the statute in question, Cal. Penal Code §459, is not a divisible statute, that is, one that contains multiple subparts, some of which qualify as categorical offenses and some not. Section 459 charges a single offense that is categorically overbroad and also is missing the generic element of "entering or remaining unlawfully".

By holding that the modified categorical approach applies to an indivisible statute like § 459, the decision diverges from the jurisprudence of those Circuits that require the statute be divisible before the modified categorical approach applies. *See, e.g., Gor v. Holder*, 607 F.3d 180, 192 (6th Cir. 2010); *United States v. Woods*, 576 F.3d 400, 404 (7th Cir. 2009); *United States v. Rooks*, 556 F.3d 1145, 1147 (10th Cir. 2009); *United States v. Gonzalez-Terrazas*, 529 F.3d 293, 297 (5th Cir. 2008); *Nijhawan v. Attorney General*, 523 F.3d 387, 393 (3d Cir. 2008). Section 459 does not divisibly penalize qualifying and non-qualifying offenses and so is not

subject to the second stage of categorical inquiry, since it is missing an element of the generic offense, entirely. There are a number of other locations that are also included in the statute, including tents, etc. By holding otherwise, the decision here manifestly conflicts with these other circuit courts on an important matter of federal law, the proper operation of the categorical analysis. This case therefore merits review. Sup Ct. R. 10(a).

Second, review is warranted, because the *manner* in which the Court of Appeals conducted the modified categorical analysis here conflicts with the Court's requirements under *Shepard v.United States.* 544 U.S. 13 (2005). In *Shepard*, the Court held that to satisfy the required showing at the second stage of *Taylor v. United States*, 495 U.S. 575 (1990), the record of a guilty plea must show the defendant "necessarily admitted elements of the generic offense" needed to bring the overbroad, state offense within the federal enhancement. 544 U.S. at 26. But, here, the record did not show that Mr. Descamps "necessarily admitted elements of the generic offense," since the pertinent statement in the plea agreement does not necessarily show the defendant entered or remained unlawfully since such a distinction was not an element, thus, not relevant to the plea. The Court of Appeals' contrary holding conflicts with the Court's description of the second-stage requirements in *Shepard*, meriting review on this important federal question. Sup. Ct. R. 10(c).

Petitioner contends that the Ninth Circuit in *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011), *En Banc*, deviated from the rulings of the majority of the other Circuit Courts with respect to using the modified-categorical approach when the statutory definition of the subject conviction under consideration was missing an element of the generic definition of Burglary, as defined in *Taylor vs. United State*s, Supra. Petitioner contends that the ruling by the Ninth Circuit is in violation of rulings of this court, and exceeds the limited use of the Modified

Categorical approach. In cases where the statute of conviction does not include as an element, the generic element required to qualify for ACCA, the Court should establish a national standard and not allow use of the modified categorical approach. Doing so results in fact finding that is in derogation of this Court's rulings and violates constitutional rights of the defendant. This Court should accept Certiorari, reverse the Ninth Circuit's ruling in *United States v. Aguila-Montes De Oca , Supra.*, apply the ruling to the instant case, and hold that the 1978 California Burglary conviction is not an ACCA predicate. The case should then be remanded for a re-sentencing without the ACCA enhancement, to a maximum of ten years.

Additionally, in order to preserve his argument and because he believes it is time for this Court to overrule *Almanderez-Torres v. United States*, 523 U.S. 224 (1998), and apply *Apprendi v. New Jersey*, 530 U.S. 224 (2000), to the issue of application of the ACCA and require an Indictment and trial on the issue, he brings forth the subjoined argument, as well.

ARGUMENT- REASONS FOR GRANTING THE PETITION

IV. Introduction

The Ninth Circuit Court's decision in *United States v. Aguila-Montes De Oca., Supra.*, was wrongly decided and is out-of-step with the majority of the other Circuit Court's in how to handle missing element cases with respect to whether a subject conviction qualifies as an ACCA predicate. The Court should accept further review in order to set forth a national standard as to how a court should treat a case where the subject conviction is missing an element of the generic definition of the crime under consideration pursuant to ACCA, and hold that the modified categorical approach cannot be applied to crimes that have a missing element of the generic crime definition.

For purposes of determining whether a subject conviction qualifies as an ACCA predicate, the term "violent felony" is defined in 8 U. S. C. § 924(e)(2)(B), in pertinent part, as follows:

> "…any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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…or otherwise involves conduct that presents a serious potential risk of physical injury to another."

Taylor v. United States instructs sentencing courts assessing a criminal defendant's prior conviction to employ a "categorical approach." 495 U.S. 575, 600 (1990). Under that approach, courts are directed to consider the elements of the crime of conviction in general, not the conduct underlying the defendant's conviction in particular. *Id.* at 602. When those elements and the requirements of the federal recidivist statute in question do not match, *Taylor* instructs that the categorical approach may be modified, but *only* "*in a narrow range of cases* where [the trier of fact] was actually required to find all the *elements* of [the] generic [crime]." *Id.* at 602 (emphases added). This "modified categorical approach," must remain categorical, not factual or "circumstance-specific." *Nijhawan v.Holder*, 129 S.Ct. 2294, 2298 (2009); *see also Taylor*, 495 U.S. at 600–02. The approach adopted in *Aguila-Montes* violates both the letter and the spirit of Supreme Court precedent. *Aguila-Montes* allows sentencing courts to "consider[ ] to some degree the factual basis" of a (possibly decades-old) prior conviction. *Aguila-Montes, supra,* at 935. So long as the sentencing court is "confident," upon examining the "prosecutorial theory of the case" and "the facts put forward by the government" in the earlier proceeding, that the trier of fact was "required" (in a practical, but not legal, sense) to find facts that would satisfy the

generic crime, then it may enhance a defendant's sentence on that basis. *Id.* at 936–37. And the sentencing court must also where there was a guilty plea (as in this case), and thus no way to determine what "theory of the case" the nonexistent trier of fact must have adopted. Most crucially, the sentencing court need no longer confine itself to the facts related to the elements of the crime of conviction, even though the prior proceeding, whether ended with a jury verdict or a guilty plea, will have been concerned at bottom only with assessing those elements, and even though *elements* have long been the touchstone of the categorical and modified categorical approach. This blurring of the line between facts and elements, and the facts necessarily required by the elements, is a significant shift in the law beyond that espoused by this Court. "Elements" are those necessary and sufficient facts that, if proven (or admitted), support a conviction for a particular crime. *See United States v. Beltran–Munguia,* 489 F.3d 1042, 1045 (9th Cir.2007) ("To constitute an element of a crime, the particular factor in question needs to be a constituent part of the offense [that] must be proved *in every case* to sustain a conviction under a given statute." (citation and quotation marks omitted, alterations in original)); *see generally Richardson v. United States,* 526 U.S. 813, 817 (1999)("Calling a particular kind of fact an 'element' carries certain legal consequences."). *Aguila-Montes*' fact-based approach is irreconcilable with *Taylor* and its many Supreme Court progeny. *Taylor* warned that "the practical difficulties and potential unfairness of a factual approach are daunting," and therefore rejected a factual approach, even though "[i]n some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury." *Id.* at 601. A fact-based approach has even less traction in the guilty plea context. *See id.* at 601–02.

The Supreme Court has rejected the type of factual inquiry adopted in *Aguila-Montes*. *Nijhawan* said that "*Taylor, James*, and *Shepard*, the cases that developed the evidentiary list to

which petitioner points, developed that list for a very different purpose, namely that 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). In other words, the point of the inquiry was to see which statutory phrase the court invoked in convicting the defendant, not to determine precisely how the court believed the crime was committed in convicting the defendant. *Nijhawan* clearly holds that the modified categorical approach is used to determine under which provision of a divisible statute a defendant was convicted, and it cannot be used to find nonelemental facts. *Id.* at 2299-2303. The flaws in *Aguila-Montes* are amply displayed in the panel's application of it in this case. As discussed infra Mr. Descamps has demonstrated that his conviction did not necessarily require a breaking and entering. Rather, under California law, his plea would be acceptable even if facts did not establish that he "entered or remained unlawfully" in a building. The element was not necessary and essential to the charge and there would have been no reason for the Petitioner to contest the issue. The panel, however, proceeded to conduct, in essence, a "mini-trial" on the prior conviction. (App. at 1-5). The panel concluded that Descamps conviction necessarily rested on facts satisfying the element of entering or remaining unlawfully and relied on the statement of the Prosecutor that there was a breaking and entering.

This approach is devoid of the limitations discussed in *Nijhawan, ante*. *Johnson v. United States*, 130 S.Ct. 1265 (2010) dispels any doubt but that *Agulia-Montes* is fatally flawed. *Johnson* held that a conviction under Florida's divisible battery statute was not categorically a violent felony because the statute encompassed convictions for "*any* intentional physical contact, no matter how slight." *Johnson*, 130 S.Ct. at 1269–70 (citation and quotation marks omitted).

Such convictions, the Supreme Court held, lacked the "violent force" necessary to make a conviction thereunder a "violent felony" for purposes of the Armed Career Criminal Act, 18 U.S.C. §924(e)(2)(B). *See Johnson,* 130 S.Ct. at 1271. The dissenters objected that this holding would make it more difficult to remove noncitizens convicted under that statute and other "generic felony-battery statutes that cover both violent force and unwanted physical contact." *Id*. at 1273 (characterizing dissenting opinion of Alito, J.). The Court responded:

> "This exaggerates the practical effect of our decision. When the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not, the "modified categorical approach" that we have approved permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record...."
> *Id.* (citation and quotation marks omitted).

The panel decision's application of *Aguila-Montes* does not determine which "statutory phrase" was used to convict Mr. Descamps. Rather, it used *Aguila- Montes* to, in effect, "re-try" the 1978 California burglary case against Mr. Descamps. That "retrial" was the first which ever occurred, since Mr. Descamps burglary conviction occurred by way of a guilty plea. Thus, *Aguila-Montes* was used to try a case which had never been tried in order to determine facts which were not needed as part of the guilty plea. *Taylor*, *Shepherd*, *Nijhawan* and *Johnson* do not authorize such a result. *Aguila-Montes* was wrongly decided, and should be overturned.

In *Taylor v. United States*, the Supreme Court established a categorical definition of burglary for purposes of section 924(e)(2)(B). Under *Taylor's* categorical approach, the Government has the burden of establishing that three elements have been satisfied. Id. The required elements are as follows: 1) unlawful or unprivileged entry into, or remaining in; 2) a building or structure; and 3) with intent to commit a crime. Id at 602.

Under *Taylor*, courts are required to compare the statutory elements of the defendant's prior offense with the elements required by the sentence enhancement law. Id. In addition, it is well accepted that the *Taylor* analysis applies not only to jury convictions but also when a defendant enters a plea of guilty. See, e.g., *United States v. Bonat*, 106 F.3d 1472, 1476 (9th Cir. 1997) (holding that an evaluation of the plea transcript is appropriate for determining whether a defendant's prior conviction meets the definition of generic burglary). See also, *Shepard v. United States*, Supra. The record must "unequivocally" establish that the defendant was convicted of the generic crime. *United States vs. Corona-Sanchez*, 291 F.3d 1021, 1211 (9th Cir. 2002)(en banc).

V. The Decision here Conflicts with Multiple Circuit Courts on the Important Federal Question Whether an Indivisible Statute (Missing an Element) is Subject to the Modified Categorical Analysis Under *Taylor.*

In *Taylor v. United States*, the Court adopted a method for determining when state convictions qualify as federal, predicate convictions for sentence enhancement and other purposes. That categorical approach limited the inquiry to a comparison of the elements of the state statute with those of the generic offense. *See* 495 U.S. at 602. However, *Taylor* also "recognized an exception to this 'categorical approach' only for 'a narrow range of cases where a jury . . . was actually required to find all the elements of' the generic offense." *Shepard*, 544 U.S. at 17 (quoting *Taylor*, 485 U.S. at 602). As *Shepard* emphasized, rejecting an expansive view of the corpus of evidence acceptable for this second-stage inquiry, "*Taylor* is clear that any enquiry beyond statute and charging document must be narrowly restricted to implement the object of the statute and avoid evidentiary disputes." *Id.* at 23 n.4.

Most circuit courts have dutifully sought to limit the scope of the second-stage inquiry by

applying the modified categorical approach only when the state statute at issue is "divisible," meaning "when it describes multiple offense categories, some of which would be [federal, generic offenses] and some of which would not." *United States v. Taylor*, 630 F.3d 629, 633 (7th Cir. 2010)(citation and internal quotation marks omitted). With a divisible statute, the courts may look tocertain judicially noticeable documents to determine which sub-offense the defendant was actually convicted of, the overbroad offense or the narrow one. *See Rooks*, 556 F.3d at 1147.

By proceeding to the second-stage analysis of § 459, the Ninth Circuit violated this Court's intention that inquiry beyond the strict categorical analysis be limited to certain exceptional circumstances. The decision likewise conflicts with the holding of multiple circuits that the modified categorical approach is properly available only when the state statute at issue is divisible. Because these conflicting holdings affect the uniform, national application of the *Taylor* analysis, this Court should grant review. *See* Sup. Ct. R. 10(a) & (c).

A. The Proper Application of the Categorical Analysis Raises Important Federal Questions, Because It Has Ramifications in Multiple Areas of Federal Law Where National Uniformity Is at a Premium

The correct operation of the *Taylor* analysis is indisputably an important question of federal law. Federal law uses prior convictions for such purposes as qualifying for recidivism schemes (e.g., 18 U.S.C. § 924(e) (felon in possession of firearm) or other sentencing enhancements (e.g., U.S.S.G. § 4B1.1 (career offender)) and as the basis for removal for conviction of an aggravated felony (e.g., 8 U.S.C. §§ 1101(a)(43) & 1227(a)(2)(A)(III)). The effects of qualifying convictions can be very severe: a defendant's statutory maximum will increase to 20 years under 8 U.S.C. § 1326(b)(2) and his Guideline sentence enhanced by 16 levels under § 2L1.2(b)(1)(A); deportation for an aggravated felony results in loss of nearly all forms of relief and raises a lengthy bar against re-entry (*see, e.g.* 8 C.F.R. § 212.2(a)).

The definition of predicate offenses affecting federal sentencing or immigration status is a matter of *federal* law. *See Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010) ("The meaning of 'physical force' in § 924(e)(2)(B)(i) is a question of federal law, not state law. And in answering that question we are not bound by a state court's interpretation of a similar–or even identical–state statute."). The need for national uniformity in defining predicate convictions derives from *Taylor*, where the Court considered the predicate offense 'burglary' for purposes of enhancement under 18 U.S.C. § 924(e). Rejecting proposals to defer to the various state law definitions, the Court emphasized the need for national uniformity in applying the federal recidivist provisions.

> Nor is there any indication that Congress ever abandoned its general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law.

Taylor, 495 U.S. at 590. The Court expressed particular concern to avoid keying the federal, generic definition to the vagaries of individual state labels and definitions. *See id.* at 591-92 (citing *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119-120 (1983) (absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, "because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control"); and *United States v. Turley*, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law")).

The need for uniformity extends to the framework for analyzing prior convictions to determine their qualification for use under federal law—the so-called categorical analysis. In

Taylor, the Court held that in order to determine whether a state conviction qualifies for use as a predicate conviction, courts must look only to the elements of the prior conviction and compare them against the elements of the generic, federal offense. *See* 495 U.S. at 602. If the elements of the state offense are the same or narrower than the generic offense, a categorical match results; if the state offense is defined more broadly, then the court may "go beyond the mere fact of conviction **in a narrow range of cases** where a jury was actually required to find all the elements of [the] generic" offense. *Id.* (emphasis added). .

In focusing on elements and limiting the factual inquiry at the second stage, *Taylor* approved caselaw discussion of the drawbacks to a non-categorical, fact-based approach. *See id*. at 600-01.In addition to statutory language and historical treatment by Congress, the Court noted the"daunting" "practical difficulties and potential unfairness of a factual approach." *Id.* at 601. Among these difficulties was the scenario where "the defendant pleaded guilty," because "there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." *Id.* at 601-02.

Thus, to avoid the unfairness and impracticality of virtual mini-trials on the facts of prior convictions, the element-based, second-stage inquiry "allowed only a **restricted look** beyond the record of conviction under a nongeneric statute." *Shepard*, 544 U.S. at 23 (emphasis added).

The Court's jurisprudence on the second-stage inquiry stresses its limited and narrow nature, being a specific exception to the otherwise-applied, strict, categorical analysis focusing in the abstract on the elements of the state and generic offenses. The second stage is reached only as needed when the issue is unresolvable by a stage-one inquiry. In particular, the Court, in its

subsequent discussion of the second-stage analysis has repeatedly acknowledged that divisible statutes are just such instances where it is necessary to determine which offense the defendant was actually convicted of. Thus, the Court has cited the instance of a divisible statute as a case where the modified caterorical analysis would be appropriate.

> The Court further noted that a "few States' burglary statutes" "define burglary more broadly" to include both a (generically defined) listed crime and also one or more nonlisted crimes. [*Taylor*, 495 U.S.] at 599. For example, Massachusetts defines "burglary" as including not only breaking into " 'a building' " but also breaking into a "vehicle" (which falls outside the generic definition of "burglary," for a car is not a " 'building or structure' "). *See Shepard v. United States*, 544 U.S. 13, 16, 17 (2005); *see also Taylor*, 495 U.S., at 599 (discussing Missouri burglary statutes). **In such cases** the Court's "categorical approach" permits the sentencing court "to go beyond the mere fact of conviction" in order to determine whether the earlier "jury was actually required to find all the elements of generic burglary." *Id.* at 602.

Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186-87 (2007) (emphasis added); *see also Johnson*. 130 S. Ct. at 1273 (describing the modified categorical analysis as applying "[w]hen the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not . . . to determine which crimes, some of which require violent force and some of which do not . . . to determine which statutory phrase was the basis for the conviction."); *Nijhawan v. Holder*, 129 S. Ct. 2294, 2303 (2009) (characterizing the Court's case law as developing the modified categorical approach to "determin[e] which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction.").

B. Consistent with *Taylor* and *Shepard*, Most Circuits Have Limited the Application of the Modified Categorical Inquiry to Divisible Statutes, While the Ninth Has Held the Contrary, Creating a Disunifying Split of Authority

In keeping with *Taylor*'s and *Shepard*'s "limited" and "narrow" circumstances in which

Court's will resort to the second stage of the categorical analysis, most circuit courts that have discussed the conditions in which judges will proceed to a modified categorical analysis restrict its application to statutes that are divisible, because they encompass more than one offense, and only some of those offenses fall under the generic, federal offense.

Courts of Appeals have for some time treated the requirement of divisibility as a central criterion for proceeding beyond the first-stage categorical analysis. For example, in *James v.Mukasey*, 522 F.3d 250, 254 (2d Cir. 2008), the Circuit's *Taylor* protocol was described as follows:

> We have adopted a "categorical approach" to decide whether a crime of conviction fits within the definition of aggravated felony in § 1101(a)(43)(A)."Under this approach ... 'the singular circumstances of an individual petitioner's crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant [.]' " **We have, however, modified this approach in one important respect**: When "a criminal statute encompasses diverse classes of criminal acts–some of which would categorically be grounds for removal and others of which would not–we have held that [the] statute [ ] can be considered 'divisible' "; the agency may then "refer[ ] to the record of conviction for the limited purpose of determining whether the alien's conviction was under the branch of the statute that permits removal."
>
> (citations omitted; emphasis added; brackets by *James*).

Some circuit courts describe the requirement of a divisible statute as a given for going beyond stage one, *See, e.g., Gor*, 607 F.3d at 192 ("Under that approach, courts look at the ' "elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime." ' Where the statute punishes diverse categories of criminal acts, some of which would subject an alien to removal and some of which would not, courts and the agency apply the so-called "modified categorical approach" to analyzing an alien's conduct.") (citations omitted); *Nijhawan*, 523 F.3d at 393 ("Cases in which a court has recourse to the modified categorical approach generally involve 'divisible' statutes . . ."). Similarly, some courts, while

recognizing a divisible statute asthe trigger to proceed to stage two, describe it as permissive for the fact-finder to then do so. *See,e.g.*, *Jaggernauth v. Attorney General*, 432 F.3d 1346, 1355 (11th Cir. 2005).

However, others described it in more exclusive and mandatory terms.

> The Government also 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. As we explained earlier, *James v. United States*, 550 U.S. 192 (2007)], *Taylor*, and *Shepard* permit a court to go beyond the statutory definition of the crime to consult judicial records (charging documents, plea colloquy, etc.) **only where 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 somehow 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's appeal.

Woods, 576 F.3d at 411 (emphasis added); *see also United States v. Zuniga-Soto*, 527 F.3d 1110, 1113 (10th Cir. 2008) ("[A] court may consider certain judicial records **only for the purpose** of determining which part of a divisible statute was charged against a defendant and, therefore, which part of the statute to examine on its face.") (emphasis added); *United States v. Howell*, 531 F.3d 621, 624 (8th Cir. 2008) ("The charging papers may be reviewed '**only to determine** under which portion of the assault statute [Howell] was convicted.' ") (emphasis added).

This requirement of divisibility reflects the properly circumspect attitude toward proceeding beyond the stage-one *Taylor* analysis only in limited circumstances. As the Fifth Circuit put it in *Gonzalez-Terrazas*,

> However, the Government has not demonstrated that this case falls within that "narrow range of cases" in which a district court may look beyond the elements of an offense to classify that offense for sentence enhancement purposes. . . . However, in a "narrow range of cases" the district court may go beyond the elements of the offense to make this determination. Specifically, "if the statute of conviction contains a series of disjunctive elements, this court may look to the indictment and, if necessary, the jury instructions, for the limited purpose of determining which of a

> series of disjunctive elements a defendant's conviction satisfies." [¶] . . . .[T]his court noted that we use the " 'modified categorical approach' **only to determine** of which subsection of a statute a defendant was convicted." Regarding the California burglary offense at issue in this case, the court noted that "[California Penal Code] § 459 has no subsection requiring 'unlawful entry.' " In this way, the court . . . recognized that the modified categorical approach, as applied by this circuit, does not apply to the "entry" element of California Penal Code § 459.

529 F.3d at 297-98 (citations omitted; emphasis added).

In the Fifth, Seventh, Eighth, and Tenth Circuits, at least, resort to the modified categorical approach is limited to cases where the state statute is divisible, and the second-stage analysis is employed solely to resolve the ambiguity of which offense the conviction stands for. The Second, Third, Sixth, and Eleventh Circuits, while not describing the basis for proceeding to the second stage in such strict terms, nonetheless identify divisibility as a central justification for going beyond *Taylor*'s first stage. Even the Ninth Circuit has acknowledged divisibility as a factor for going beyond the strict categorical analysis. *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008), at 1160 (stating stage two is "appropriate" when the statute is divisible). The Fourth Circuit, like the Ninth, has acknowledged that divisibility is at least an occasion for employing the modified categorical approach. *See Rivas v. Mukasey*, 257 F. App'x 639, 641 (4th Cir. 2007) (citing *Duenas-Alvarez*).

Eight circuits view divisibility of the state statute as a central criterion for proceeding beyond the strict, categorical analysis to the limited exception at the second stage. Half of those circuits treat divisibility as a *sine qua non* for deviating from the basic categorical approach. Here, the Ninth Circuit departed from this overwhelming legal trend by treating Mr. Descamp's case as falling into the "narrow range of cases" where the second stage applies, even though the statute at issue is manifestly indivisible as to the missing element. Had Mr. Descamp's case been decided in the Fifth Circuit, the result would have been identical to that in *Gonzalez-Terrazas*,

where the court refused to sanction a modified categorical inquiry on an indivisible (California) statute. But because Mr. Descamps's appeal was heard by a panel in the Ninth Circuit, where the divisibility criterion is not recognized, his appeal was decided the other way.

This is the very essence of an anomalous application of the categorical approach in *Taylor*, threatening national uniformity of the law of categorical analysis and in conflict with the overwhelming trend of circuit case law. Because the decision here conflicts with the law of multiple circuits and with this Court's categorical-analysis jurisprudence, review is warranted. *See* Sup. Ct. R. 10(a) & (c).

VI. Enhancement Under the ACCA is Unwarranted Because the Judicially Noticeable Facts Do Not Demonstrate That the Defendant Was Convicted of the Generic Crime of Burglary. Additionally, the Court Should Reverse on the Basis of a Lack of Indictment and Trial on the Issue of Application of ACCA

California penal code Sec. 459 is far too sweeping to satisfy the *Taylor* definition of generic burglary. The statute provided, in pertinent part:

> "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises."

As set forth in *Taylor*, the documentation must unequivocally establish that the defendant was convicted of the generic crime of burglary by showing (1) the unlawful and unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime. Id at 598.

A review of the record provided in this matter does not unequivocally establish that defendant was convicted of the generic crime of burglary. The Information filed by the District Attorney accused the defendant of "willfully, unlawfully and feloniously entering a building, with intent to commit a theft therein". However, at the plea, there was no acknowledgment of these facts, with the only "admission" by the prosecutor that "in substance" there was a breaking and entering of a grocery store. Thus, although there is evidence to support an unlawful entry of a building, there was nothing in the record to establish that the entry in the building occurred with the requisite "generic" intent. Accordingly, since the "generic elements" of burglary specified by the Supreme Court cannot be met, it is submitted that this criminal conviction cannot be used as a predicate offense to support the ACCA enhancement.

All of the documents use the term "Centromart", however, there are no additional facts contained in any of the documents that shows that the "building" under consideration was a generic one under *Taylor*. There is still the possibility that the "building" that is being discussed could have been based on the definition contained in Sect. 459, and could have been a "..tent…".

The fact that a business name is provided in the Information/Complaint does not disprove that the burglary could have involved a tent, hence, there is insufficient proof that the charge necessarily involved a generic building. Furthermore, the transcript does not provide enough information provide as to what was meant when the term "building" was being used. The definition is expansive by its terms.

In the transcript (ER 46) the only pertinent part provided, as follows:

"…The Court: Is there a factual basis for the entry of the plea of guilty, Mr. Tautman?

Mr. Tautman: There is a factual basis.

The Court: Do you concur in that, Mr. DeSilva?

Mr. De Silva: Yes, your Honor.

The Court: In substance, what does this involve?

Mr. De Silva: This involves the breaking and entering of a grocery Store.

The Court: On North California Street?

Mr. De Silva: Yes, Your Honor….."

The "grocery store" could have involved a tent since many grocery stores do have tent sales and often use tents to store items.

In *Shepard* the Court went further in Part III of its opinion to point out that accepting the government's position would raise Sixth Amendment concerns. The Court noted that even though there has been a prior conviction in state court, the state conviction may not clearly indicate those facts on which the prior conviction necessarily rested. At that point, a federal sentencing judge may make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea. The Court notes that this:

> "...dispute raises the concern underlying Jones and Apprendi: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to Jones v. United States, 526 U.S. 227 (1999) and Apprendi v. New Jersey, 530 U.S. 224 (2000) to say that Almandez-Torres v. United States, 523 U.S. 224 (1998) clearly authorizes a judge to resolve the dispute."

Id. at 125 S. Ct. 1262.

It appears that the Court is avoiding making a constitutional decision by holding that the judge can make a limited enquiry as to whether there is sufficient proof of the prior offense qualifying under the ACCA using the limited documents that were mentioned. In the instant case, the government will no doubt urge the Court to make a factual decision that when the Court in California was using the word "building", it meant a building as required in *Taylor*. If the Court does delve into this fact finding area, then the defendant contends that he is entitled to have a jury make this determination, with proof beyond a reasonable doubt under *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004). In fact, the failure of the government to indict the defendant under the Armed Career Criminal Act and prove facts to a jury should preclude the government from pursuing ACCA in this matter. In the watershed ruling in *Apprendi*, the Supreme Court established the constitutional norm that the Fifth and Sixth Amendments require all factors that increase the statutory maximum to be proved to a jury beyond a reasonable doubt. The *Apprendi* Court recognized a "narrow exception" to this rule for undisputed prior convictions under the immigration statutes in *Almendarez-Torres*. The Court reinforced the *Apprendi* rule by applying it to guideline enhancements in *Blakely*, Supra., and to the federal right to indictment in *United States v. Cotton*, 535 U.S. 224 (2002). Under the statute, or alternatively, the Constitution, Mr. Descamps contends that he is entitled to relief based on the failure to indict and to prove to a jury the facts that result in a sentence in excess of the statutory maximum under Section 922(g). In its opinion in *Apprendi*, the Court quoted the *Jones* Court's admonition that "the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment [require that] any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a

jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6).

In order to avoid the constitutional problems, this Court should simply hold that the government has failed to establish that the California burglary conviction count under ACCA due to the lack of factual proof that these involved generic burglary under *Taylor*.

In *Shepard* the Court stated at page 1262 and 1263:

> "…The state statute requires no finding of generic burglary, and without a charging document that narrows the charge to generic limits, the only certainty of a generic finding lies in jury instructions, or bench trial findings and rulings, or (in a pleaded case) in the defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea. In this particular pleaded case, the record is silent on the generic element, there being no plea agreement or recorded colloquy in which Shepard admitted the generic fact.
> Instead, the sentencing judge considering the ACCA enhancement would (on the Government's view) make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea, and the dispute raises the concern underlying Jones and Apprendi: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to Jones and Apprendi, to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute. The rule of reading *1263 statutes to avoid serious risks of unconstitutionality, see Jones, supra, at 239, 119 S.Ct. 1215, therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as Taylor constrained judicial findings about the generic implication of a jury's verdict. [FN5]"

CONCLUSION

This appeal raises important questions of the proper scope of the *Taylor* analysis, a procedure having wide-spread application and where national uniformity is at a premium. The petition for a writ of certiorari should be granted to resolve the circuit split on the application of the modified categorical approach to indivisible statutes, including those statutes with a missing

element of the generic federally defined crime. The Court should reverse the application of the ruling of the Ninth Circuit in *United States v. Aguila-Montes De Oca*, apply the reversal ruling to the present case on appeal, and remand with instructions that the California Burglary Statute may not be used to enhance the Defendant/Petitioner's sentence under ACCA, thus Defendant/Petitioner would not be subject to sentencing under ACCA. Alternatively, this Court should grant this Petition and overrule the ruling in Almandez-Torres v. United States, 523 U.S. 224 (1998) and pursuant to the requirements of Apprendi v. New Jersey, 530 U.S. 224 (2000), require an Indictment and proof beyond a reasonable doubt before a jury to justify application of the Armed Career Criminal Act.

Respectfully submitted this ___ day of March, 2012,

_____

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MATTHEW ROBERT DESCAMPS- PETITIONER

vs.

UNITED STATES OF AMERICA-RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS-NINTH CIRCUIT

APPENDIX

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