No. 11-9540

IN THE

Supreme Court of the United States

MATTHEW ROBERT DESCAMPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

REPLY BRIEF 1

I. Convictions under statutes that lack an element necessary to the generic violent felony cannot be brought within the ACCA definition by use of the modified categorical approach. 3

II. The modified categorical approach does not apply to California Penal Code § 459, which contains a unitary entry element and is missing an element of generic burglary. 8

III. Expansion of the modified categorical approach would cause increased litigation while undermining certainty.. 14

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page

CASES

Chambers v. United States,
555 U.S. 122 (2009) 6, 8

Commonwealth v. Boyd,
897 N.E.2d 71 (Mass. App. Ct. 2008) 7

James v. United States,
550 U.S. 192 (2007) 8

Johnson v. United States,
130 S. Ct. 1265 (2010) 6, 12

Nijhawan v. Holder,
557 U.S. 29 (2009) 6

People v. Balestreri,
No. H030622, 2007 WL 4792846 (Cal. Ct. App.
Dec. 18, 2007). 9

People v. Barry,
94 Cal. 481 (1892). 10

People v. Dowlatshahi,
No. B205068, 2009 WL 2961937 (Cal. Ct. App.
Sept. 17, 2009) 9

People v. Felix,
23 Cal. App. 4th 1385 (Cal. Ct. App. 1994) 9, 11

Cited Authorities

Page

People v. Gauze,
542 P.2d 1367 (Cal. 1975) 2, 9, 10

People v. Nguyen,
40 Cal. App. 4th 28 (Cal. Ct. App. 1995) 9

People v. Pearson,
No. B225375, 2011 WL 5429497 (Cal. Ct. App. Nov. 9, 2011) 9

People v. Pendleton,
25 Cal.3d 371 (1979) 10, 11

People v. Sherow,
128 Cal. Rptr. 3d 255 (Cal. Ct. App. 2011) 11

Shepard v. United States,
544 U.S. 13 (2005) . . . . . *passim*

Taylor v. *United States*,
495 U.S. 575 (1990) . . . . . *passim*

United States v. Beardsley,
691 F.3d 252 (2d Cir. 2012) 16

United States v. Holloway,
630 F.3d 252 (1st Cir. 2011) 7

Page

CONSTITUTIONAL PROVISIONS AND STATUTES

18 U.S.C. §924(e) . . . . . *passim*

California Penal Code § 459 . . . . . .3, 8, 11

Idaho Penal Code § 18-1401 14

Nev. Penal Code § 205.060 14

OTHER AUTHORITIES

2012 California Rules of Court, Rule 2.1050 11

CALCRIM 1700 11

State of California Department of Justice, Office of the Attorney General, Table 2: Supplemental Detail For Selected Crimes 2001-2010 14

REPLY BRIEF

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides for enhanced sentences for those felons convicted of gun possession who have three prior convictions for violent felonies. The statute specifically states that a conviction for an offense that "is burglary" is a violent felony. This Court has held that, to be "burglary" within the meaning of § 924(e), the prior offense must have an element of unlawful entry. *Taylor v. United States,* 495 U.S. 575, 598–99 & n.8 (1990). *Taylor* recognized that "[a] few States' burglary statutes" define the offense denominated burglary "more broadly, *e.g.* by eliminating the requirement that entry be unlawful[.]" *Id.* at 599. California is one of those "few" states. Its burglary offense does not require an unlawful or unprivileged entry (*i.e.,* trespassory entry). Indeed, as this Court noted in *Taylor*, California "defines 'burglary' so broadly as to include shoplifting . . . ." *Id.* at 591. Because the element of unlawful entry is not required to establish a California burglary conviction, such a conviction is not for "burglary" in the generic, contemporary meaning given that term under § 924(e).

Although California law does not require an unlawful entry, the government claims that Mr. Descamps's California burglary conviction can be made a § 924(e) burglary conviction under the "modified" categorical approach. The government's view of the modified categorical approach allows consideration of facts unnecessary to a conviction, and even the manner and means involved in the commission of the offense. That view deviates sharply from this Court's teachings, and from the textual and constitutional underpinnings of the

categorical approach. The modified categorical approach applies only when the law of the jurisdiction in which the prior conviction was obtained allows conviction under alternative elements, with one set of elements constituting an ACCA violent felony, while the other does not.

California law does not set out alternative entry elements for the offense of burglary – there is only an element of entry. There is no alternative statutory element of unlawful entry. Nor does California decisional law set out an alternative unlawful-entry element. As the California Supreme Court has made clear, the invasion-of-a-possessory-interest language in *People v. Gauze*, 542 P.2d 1365 (Cal. 1975), seized upon by the government, does not establish an unlawful-entry element for California burglary.

The government asks the Court to expand the modified categorical approach beyond its well-established bounds by allowing consideration of the facts underlying a particular conviction. That expansion runs contrary to § 924(e)'s text – the statute directs sentencing courts to identify whether a prior "conviction" is "for a violent felony," not to assess whether the facts show that the defendant *could have* been convicted of a violent felony. The government's expansion also raises constitutional doubts, as it permits a federal sentencing court to make findings about conduct that occurred during a prior offense. And, the government's approach would engender significant litigation and defeat the goal of certainty in application of the § 924(e) enhancement.

I. Convictions under statutes that lack an element necessary to the generic violent felony cannot be brought within the ACCA definition by use of the modified categorical approach.

The elements of the prior conviction are, as the government concedes, central to the categorical and modified categorical approaches. (Resp. Br. 11, 30). Rather than address whether the elements of Mr. Descamps's prior California burglary conviction categorically fit the elements of "burglary" as used in 924(e), the government spends a considerable portion of its brief engaging arguments that Mr. Descamps has not made, matters that are not disputed, and issues that are neither necessary to, nor presented by, this case.

The government begins by changing the question presented. It then responds to unraised arguments regarding "judicially divisible" statutes, all while misreading this Court's precedent. The government's elision of elements and its emphasis on conduct begins early. It excises the word elements from the "Question Presented," asking instead whether the modified categorical approach can be used "when section 459 encompasses both offenses that are generic burglary under *Taylor v. United States*, 495 U.S. 575 (1990), as well as offenses that are not." (*Compare* Resp. Br. I *with* Pet. Br. I).

The government uses the term "offense" as if an offense can exist apart from its elements. It cannot. *Shepard v. United States*, 544 U.S. 13, 19 (2005) (statute focuses on elements, not conduct). Offenses exist only as they are defined. The way in which offenses are defined is

by elements – the matters that must be shown to obtain a conviction. Conduct beyond the elements occurs in almost every case, and may have even been admitted or not contested, but that conduct is not necessary to the offense of conviction. The government uses "offense" to embrace non-elemental conduct and facts underlying a specific conviction. It suggests that, because case-specific, non-elemental conduct might be said to establish a burglary offense under a generic elemental definition of burglary, a particular conviction under a statute that does not include those elements may qualify as burglary for ACCA purposes. This argument runs directly contrary to the plain language of § 924(e), which requires a "conviction" that "is burglary." *Taylor*, 595 U.S. at 600. A conviction for the generic offense that is "burglary" contains an element of unlawful entry. When, as under the California statute, a conviction for burglary does not require that the elements of a generic burglary be proved, the modified categorical approach does not permit looking beyond the elements of conviction to conduct. The government cannot alter that legal reality by simply omitting the word "elements" from the discussion.

The government, while omitting "elements" from the question presented, does try to add them back in with its claim that statutes may contain "judicially divisible" elements. The government claims that Mr. Descamps argues that the modified categorical approach may be applied only to statutes that are textually divisible into alternative elements (Resp. Br. 9, 12), and not to statutes that are held by decisional law to set forth alternative elements for a crime. (Resp. Br. 10, 12). For fourteen pages, the government argues that judicial interpretations of state criminal statutes can create alternative elements

that could also be examined under the modified categorical approach. (Resp. Br. 17-30).

It may well be that decisional law holding that a statute contains alternative elements could bring the modified categorical approach into play. But there is no "judicially divisible statute" (Resp. Br. 28) in this case, and, in any event, Mr. Descamps has not argued that the modified categorical approach could never apply to such a statute. The government's lengthy discussion of judicial divisabilty draws attention away from the actual language of the California statute at issue, the elements of burglary under that statute and the case law interpreting it, and – most important – the proper boundaries of the modified categorical approach in assessing a non-divisible statute.

In *Taylor*, this Court interpreted the generic crime of burglary to mean a crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." The Court found that this categorical, elemental approach is required by the ACCA. The statute has not changed. It remains true that "[t]he language imposing the categorical approach" "refers to predicate offenses not in terms of prior conduct, but of prior 'convictions' and 'the element[s]' of crimes." *Shepard v. United States*, 544 U.S. 13, 19 (2005) (*citing Taylor*, 495 U.S. at 600-01 and 18 U.S.C. 924(e)).

The government concedes that the modified categorical approach does not apply when an offense is "'missing altogether' an element corresponding to an element of the generic crime." (Resp. Br. 30; *see also* Resp. Br. 11). This is so because, when the element is missing, "then the defendant cannot have 'necessarily admitted' the generic

element," and any "indication in the *Shepard* records" of the defendant's actual conduct "would be outside of the proper scope of the sentencing court's inquiry." (Resp. Br. 30). The government also concedes that the Court's precedents apply the modified categorical approach to statutes with alternative elements (Resp. Br. 17-19) – some of which constitute the generic offense at issue and some of which do not. (Pet. Br. 19-26 [*citing Taylor*, 495 U.S. at 578, 598-99, 602; *Shepard*, 544 U.S. at 17, 21; *Chambers v. United States*, 555 U.S. 122 (2009); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Johnson v. United States*, 130 S. Ct. 1265 (2010)]).

In spite of these significant concessions, however, the government insists that the modified categorical approach can be applied to California burglary. To reach that result, the government, with its arguments about judicial divisability, blurs the line between the legal elements of an offense and the factual manner and means by which an offense is committed. This blurring permits conduct referenced in the *Shepard* documents to be considered, though it was not necessary to the conviction.[1] (Resp. Br. 19–30).

The government justifies this shift by pointing out that some statutes have been recognized by courts as divisible. (Resp. Br. 20). But there is a crucial difference between statutes that use alternate elements to define multiple offenses and those that set out a unitary offense

1. Were the means of commission of an offense an element of the offense, it would need to be proved beyond a reasonable doubt. Generic unlawful entry is never required to be proved beyond a reasonable doubt to sustain a conviction for California burglary. *See* Section II, *infra.*

with a single set of elements.[2] For statutes that set forth multiple offenses with alternative elements, the modified categorical approach permits the ACCA sentencing court to determine which set of alternative elements formed the basis of the defendant's prior conviction.[3] The modified categorical approach does not permit statutes to be reinterpreted by the ACCA court to discern alternative elements that the convicting jurisdiction has not recognized. The government's argument would allow sentencing courts to rewrite a unitary element (*e.g.*, entry)

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2. The government attempts to blur this difference by arguing that, with a unitary offense, a court may discern and proclaim "no more than what the legislature might otherwise have stated explicitly." (Resp. Br. 23). This cannot be. In a statute with multiple, alternative elements a court simply recognizes what is there when it declares the offenses distinct; in a unitary statute, especially when, as the government would have it, a later sentencing court looks at a prior conviction and declares what might have been there, the court is adding matters that were not required for conviction.

3. Thus the Massachusetts simple assault and battery statute (*see* Resp. Br. 20), which simply codifies several common-law battery offenses, is divisible. That statute codified alternative elements of three offenses: (1) harmful battery; (2) offensive battery; and (3) reckless battery. Such a statute may be susceptible to application of the modified categorical approach, because the *Shepard* documents can be consulted to determine which "statutory phrase," or set of alternative elements, formed the basis of conviction. *United States* v. *Holloway*, 630 F.3d 252, 257 (1st Cir. 2011) (*citing Commonwealth* v. *Boyd*, 897 N.E.2d 71, 76 (Mass. App. Ct. 2008), review denied, 901 N.E.2d 137 (Mass. 2009)). In contrast, California burglary is a unitary offense with a single set of elements and, as defined, it lacks the generic element of unlawful entry. There may be many ways of committing California burglary, but there is only one set of elements.

into a series of "sub-elements" (*e.g.*, simple entry, unlawful or unprivileged entry, invasion of possessory interest, etc.) which really reflect nothing more than alternative factual means of proving the unitary element. In other words, the argument simply calls for application of the modified categorical approach to find facts – a result at odds with *Taylor* and *Shepard*. Such judicial fact-finding raises the constitutional concerns discussed in *Shepard v. United States*, 544 U.S. at 24 and *James v. United States*, 550 U.S. 192, 214 (2007).[4]

The government's approach, contrary to its arguments, is also at odds with this Court's decision in *Chambers v. United States*, 555 U.S. 122 (2009). (*See* Resp. Br. 21-22). *Chambers* does not allow the application of the modified categorical approach whenever conduct criminalized in a prior-conviction statute includes both conduct criminalized by the generic offense and non-generic conduct. Rather, the Court held that a statute that criminalized multiple escape and failure to report offenses with alternative elements was subject to the modified categorical approach. Thus, the *Chambers* Court retained the focus on determining which set of alternative elements, and thus which discrete offense, was necessarily admitted. *Chambers*, 555 U.S. at 126-30.

II. The modified categorical approach does not apply to California Penal Code § 459, which contains a unitary entry element and is missing an element of generic burglary.

The statutory text of California Penal Code § 459 establishes no entry element beyond entry *simpliciter*.

4. *See also* Pet. Br. 13, 29-33.

The statute provides that "every person who enters any house, room, apartment..." "with intent to commit grand or petit larceny" is guilty of burglary.[5] The text of the statute is missing an element of generic burglary – unlawful or unprivileged entry into a building or structure. *See Taylor*, 495 U.S. at 599. A conviction for California burglary is therefore not a conviction for "burglary" as the term is used in § 924(e), and as burglary is determined using the categorical approach.

The government ventures that, despite the lack of the required unlawful-entry element, a conviction for California burglary can be a § 924(e) burglary conviction because a California case, in holding that one cannot burglarize his own home, stated that entry must invade a possessory interest. (Resp. Br. at 23, 36-37 (*citing People v. Gauze*, 542 P.2d 1365 (Cal. 1975))). The government is incorrect. *Gauze*'s "invasion of a possessory interest" is not the same thing as unlawful entry. The California Supreme court made that clear in a case that followed

5. For examples of California burglaries that demonstrate the lack of any generic unlawful-entry element, *see, e.g.*, *People v. Nguyen*, 40 Cal. App. 4th 28 (Cal. Ct. App. 1995) (entering a dwelling with the intent to steal property by giving the victim a worthless check in exchange for various items); *People v. Felix*, 23 Cal. App. 4th 1385 (Cal. Ct. App. 1994) (brother had sister's implied consent to enter her home); *People v. Pearson*, No. B225375, 2011 WL 5429497 (Cal. Ct. App. Nov. 9, 2011) (entering a bank intending to cash bad checks); *People v. Dowlatshahi*, No. B205068, 2009 WL 2961937 (Cal. Ct. App. Sept. 17, 2009) (consensual entry into the victim's home intending to engage in a counterfeit money and theft scheme); *People v. Balestreri*, No. H030622, 2007 WL 4792846 (Cal. Ct. App. Dec. 18, 2007) (attending an open house with the intent to obtain cash from the real estate agent under false pretenses).

Gauze, by specifically ruling that "one may be convicted of burglary even if he enters with consent[.]" *People v. Pendleton*, 25 Cal.3d 371, 382 (1979). The *Pendleton* Court stated explicitly that *Gauze* had answered only the narrow question whether a defendant could be guilty of burglarizing his own home, and did not overrule existing precedent regarding the unlawful-entry element. *Id.* at 382. *Gauze* simply did not rewrite the elements of California burglary.

But one need look no further than *Gauze* itself to understand its reach and import. *Gauze* held that a defendant cannot be convicted of burglarizing his own home. But the California Supreme Court did not impute an element of unlawful entry, in the *Taylor* sense, into the California burglary statute. Indeed, *Gauze* made clear that generic unlawful entry is not an element of California burglary:

> The elimination of the breaking requirement was further interpreted in *People v. Barry* (1892) 94 Cal. 481, 29 P. 1026, to mean that trespassory entry was no longer a necessary element of burglary. In *Barry*, this court held a person could be convicted of burglary of a store even though he entered during regular business hours. A long line of cases has followed the *Barry* holding.

Gauze, 542 P.2d at 1367 (citing cases). *Gauze*'s discussion of an invasion of a possessory interest was specific to the question of whether one could be convicted under the statute of burglarizing his own home. *Gauze* never indicated that generic unlawful entry in general is an

element of California burglary.[6] *See Pendleton*, 25 Cal.3d at 382 (lawful, consensual entry is sufficient to prove the only entry element for California burglary).

Assuming, *arguendo*, that "invasion of possessory interest" is an element, it is not the generic element of "unlawful or unprivileged" entry. Satisfaction of the elements of California burglary offense will never necessarily satisfy the elements of generic burglary, because the fact-finder is never necessarily required to find an unlawful entry sufficient to satisfy *Taylor*. "Unlawful or unprivileged" entry is one of an infinite number of means for committing an "invasion of possessory interest," but it is never a required element to convict. Jurors are not instructed on any unlawful or unprivileged entry element pursuant to California's pattern jury instructions. *See* CALCRIM 1700.[7]

California Penal Code § 459 contains an unadorned, unitary entry requirement with no alternative elements.

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6. In *People v. Sherow*, 128 Cal. Rptr. 3d 255, 266 (Cal. Ct. App. 2011), the court explained that consent to enter, and the related issue of invasion of a possessory right, is not an element but was instead an affirmative defense. California case law has thus developed a consent *defense* to burglary *People v. Felix*, 28 Cal.Rptr.2d 860 (Cal. Ct. App. (1994)).

7. *See* http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf, CALCRIM 1700. "The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California." 2012 California Rules of Court, Rule 2.1050(a). "The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law." 2012 California Rules of Court, Rule 2.1050(b).

The modified categorical approach does not apply to that offense, as that analysis asks which statutory phrase, or alternative element, formed the basis of the conviction. Since the statutory phrase forming the basis of Mr. Descamps's conviction was simple entry, the unlawful-entry element identified in *Taylor* is missing. The offense is therefore not burglary within the meaning of § 924(e).

The government concedes that the "invasion of a possessory right" element is not a categorical match to *Taylor*'s unlawful-entry element. (Resp. Br. 38). The government argues, however that "invasion of possessory interest" can be demonstrated by certain means that would satisfy the generic "unlawful" entry, thus allowing for application of the modified categorical approach. (Resp. Br. 38). As Mr. Descamps argued above, this argument conflates the factual means of committing an offense with its elements. Alternative means of committing an offense, and underlying facts, are not the equivalent of elements. *See* Section I, *ante*. There is but one unitary element of entry against a possessory interest, with no alternative elements to analyze under the modified categorical approach. That California may have some qualification to its entry element does not change the fact that generic unlawful entry is never an element of California burglary.

The government's suggestion that a California burglary could involve unlawful entry – though that would never be an element of the offense – and thus could be burglary within the meaning of § 924(e) cannot be reconciled with *Johnson v. United States*, 130 S.Ct. 1265 (2010). In *Johnson*, this Court applied the modified categorical approach to a Florida statute that contained alternative elements to decide whether the defendant's

battery conviction was a "violent felony" under the "force" clause of § 924(e). One section of the Florida statute criminalized intentionally striking another (which had an element of "violent force"), while another section prohibited the actual or intentional touching of another (which did not). *Id*. at 1269. The Court held that the modified categorical approach could be used "to determine *which statutory phrase* was the basis for the conviction by consulting the trial record..." *Id*. at 1273 (emphasis added).

In *Johnson*, the Court looked to the alternative elements, and no further. Once the Court concluded that the "offensive touching" portion of the Florida battery statute lacked the required "violent force" element defined by the ACCA, its inquiry ceased. *Id*. at 1269. It ceased despite the fact that the "offensive touching" element could be committed in many different ways – including through the use of "violent force." The Court did not authorize the government's approach here – going beyond the elements to the actual conduct underlying the offense or to the manner and means alleged. *Johnson* simply clarifies, yet again, that a unitary element cannot be broken down into alternative elements based on different factual methods for committing the offense.

The only entry element required for conviction of burglary in California is simple entry, which may be lawful entry. The § 924(e) inquiry ends with the delineation of the element. Because "burglary" as used in § 924(e) requires unlawful entry, and burglary under California law does not, a California burglary cannot serve as a predicate conviction for enhancing a defendant's sentence under § 924.

III. Expansion of the modified categorical approach would cause increased litigation while undermining certainty.

Recasting the elements of an offense constitutes a significant expansion of the modified categorical approach – as does allowing inquiry into the facts and conduct behind a prior conviction, rather than into the recognized elements of the offense. Neither expansion finds support in this Court's precedent (Pet. Br. 19-26), and each is inconsistent with the ACCA and its legislative history. Congress certainly did not intend to permit federal sentencing courts to repeatedly examine the myriad applications of a State statute in an effort to divine unenumerated "elements" that are, in actuality, merely various manners and means of committing the offense.[8] Under the government's approach, every state court opinion endorsing a conviction based on a particular means of committing an offense potentially leads to the

8. The government's fact-intensive inquiry would prove extremely burdensome. California prosecutes well over 200,000 cases of burglary each year. State of California Department of Justice, Office of the Attorney General, Table 2: Supplemental Detail For Selected Crimes 2001-2010, *available at* http://oag.ca.gov/sites/all/files/pdfs/cjsc/ prof10/2/00.pdf?. Nearly 40 percent of these cases do not involve any force at all, raising the prospect that California prosecutes thousands of cases of burglary in which the offender lawfully entered the structure with the victim's consent. Other states broadly define burglary to encompass privileged entries. *See, e.g.*, Idaho Penal Code § 18-1401; Nev. Penal Code § 205.060. Considering the frequency of burglary convictions nationwide, and the number of such convictions which do not involve the generic unlawful-entry element, the frequency and intensity of modified categorical approach litigation would increase exponentially under the government's approach.

recognition of new or different elements of a statute, opening the door to endless litigation over what constitutes the elements of an offense. That approach is rightfully alien to the law. While federal sentencing courts properly examine state law to discern the actual, recognized elements of an offense, they ought not – and, practically speaking, cannot – embark on wholesale reassessments of what constitutes an element by looking at every state court factual application of the law.

As noted in Petitioner's brief, the government's approach also undermines the certainty required by *Taylor*. Defendants have no incentive to contest or correct factual recitations that do not go to the elements of the offense or to the authorized punishment for the offense at hand. (Pet. Br. 33-35). The government concedes this point, but marginalizes it as a "theoretical concern" that arises under any view of the modified categorical approach, and that in any event has not "proven problematic in practice." (Resp. Br. 34). But the modified categorical approach, properly limited to the determination of which set of alternative elements the defendant was convicted under, raises no reliability concern because the defendant has every incentive to contest a fact going to the element of an offense. And the government's blithe assurance that the problem does not frequently arise is unwarranted – the disincentive to quarrel about facts immaterial to guilt or the authorized punishment for the offense at hand is ever present.

Mr. Descamps' California burglary conviction demonstrates the point. Whether or not Mr. Descamps broke into the supermarket that he was accused of burglarizing was irrelevant to his conviction or authorized

punishment. Since unlawful entry is not an element of California burglary, he could not defend against that offense, by claiming, for example, that he had not actually broken into the supermarket, but had instead walked in just as the supermarket was closing. Such a defense was futile, since entering the supermarket under any circumstances with the intent to commit theft satisfies the elements of California burglary. The prosecutor's extraneous statement that this offense involved "breaking and entering" did not establish any element of the offense, and there was no incentive to contest it.

The government's position would allow for the application of the modified categorical approach to virtually any felony offense. Typically non-violent convictions such as theft, shoplifting, trespass, and destruction of property would be subject to the modified categorical approach based on the possibility that they were coupled with a "violent" act. (*See* Pet. Br. 27-28). That approach erroneously proceeds with an examination of the *Shepard* documents to determine the underlying "basis of conviction." *See United States v. Beardsley*, 691 F.3d 252, 272 (2d Cir. 2012). Universal application of the modified categorical approach violates the principle that it only applies in the "narrow range of cases where a jury was actually required to find all the elements of generic burglary." *Taylor*, 495 U.S. at 602.

This Court anticipated precisely the government's position – requiring a federal sentencing court retrospectively to piece together the prosecution's theory of the case, and the underlying facts, in the prior conviction – as a potential source of "practical difficulties and potential unfairness." *See Taylor*, 495 U.S. at 601.

This Court also foresaw the government's argument for expanding the ACCA analysis in the name of uniformity (Resp. Br. 25), and rejected it as a "call to ease away from the *Taylor* conclusion, that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State." *Shepard*, 544 U.S. at 23. Any approach that approves a recasting of elements of a prior-conviction offense, or the determination of underlying facts and conduct, renders the results of the inquiry less, not more, certain. The Court has consistently rejected the government's invitations to back away from *Taylor*, and should do so again.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed, and the case remanded to the court of appeals with instructions to remand to the district court for resentencing.

Respectfully submitted,

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