No. 11-9540

IN THE

Supreme Court of the United States

MATTHEW ROBERT DESCAMPS,

Petitioner,

v.

UNITED STATES,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of a crime or wrongdoing.[1] A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries – and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving federal sentence enhancements. In furtherance of

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief.

this and its other objectives, NACDL files approximately 50 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. The NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Among the NAFD's guiding principles is its commitment to promote fair adjudication in criminal matters by appearing as *amicus curiae* in cases of significant and recurring importance to indigent defendants.

Both *amici* have a particular interest in this case because rules recently adopted by the Ninth Circuit would dramatically alter how federal judges apply sentence enhancements. This implicates not only the rights of the criminal defendants amici's members represent, but also the ability of those members to provide accurate advice about the consequences of convictions.

STATEMENT OF THE CASE

A federal court sentenced petitioner to more than twenty years in prison for being a felon in possession of a firearm. More than half of that sentence resulted from the trial court's conclusion that a 1978 conviction in California constituted "burglary" for the purposes of imposing a sentence enhancement under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). On appeal, the United States Court of Appeals for the Ninth Circuit acknowledged that the California statute of conviction encompassed more conduct than the federal definition of "burglary," and that imposing the sentence enhancement would contravene the categorical approach established by this Court for applying the ACCA. But even as it conceded that the categorical approach precludes an examination of the facts underlying a particular conviction, the court of appeals read this Court's "modified" categorical approach decisions to permit precisely that fact-specific inquiry. Applying that approach, the Ninth Circuit upheld the ACCA enhancement on the ground that the facts underlying petitioner's state conviction – as allegedly admitted by petitioner in his plea colloquy – would have supported a conviction for burglary under the federal definition.

1. Petitioner Matthew Descamps was convicted in federal court of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). Pet. App. 6. The statutory maximum sentence for this offense is ten years' imprisonment. 18 U.S.C. § 924(a)(2). The Government sought a sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e), which requires a

minimum sentence of fifteen years for a defendant who "has three previous convictions . . . for a violent felony or a serious drug offense," *id.* § 924(e)(1).

The term "violent felony" includes a conviction for "burglary" that is "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(e)(2)(B). In *Taylor v. United States*, 495 U.S. 575 (1990), this Court held that the term "burglary" in the ACCA refers to a "generic" federal crime of burglary rather than to the state of conviction's definition of that offense. *Id*. at 599. As articulated by the Court, generic federal burglary is defined as the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id*.

The Government argued that Descamps qualified for a sentence enhancement because he had been convicted of three violent felonies, one of which was a 1978 burglary conviction in California. Descamps argued, among other things, that the 1978 conviction did not constitute a violent felony because the California burglary statute does not contain the element of "unlawful entry" necessary to the federal offense. The judge, however, found that regardless of the elements of the state offense, Descamps' entry had been unlawful, pointing to a passage from the transcript of the 1978 plea colloquy that read:

> The Court: Is there a factual basis for the entry of the plea of guilty, Mr. Tauman?
>
> Mr. Tauman [Descamps' attorney]: There is a factual basis.
>
> Court: Do you concur with that, Mr. DeSilva?
>
> Mr. DeSilva [state prosecutor]: Yes, Your Honor.

> Court: In substance, what does this involve?
>
> Mr. DeSilva: This involves the breaking and entering of a grocery store.

Pet. App. 40. Relying on the fact that Descamps did not object to the state prosecutor's characterization of his conduct as "breaking and entering" – a characterization irrelevant to the state charge – the federal trial judge determined that Descamps had confessed to "unlawful entry." Pet. App. 9. The trial court therefore held that the California burglary conviction amounted to Descamps' third predicate felony, and that an ACCA enhancement was warranted.

The court sentenced Descamps to more than twenty-one years in custody and five years of supervised release. Pet. App. 27. As a result, the ACCA enhancement more than doubled the sentence petitioner otherwise would have received.

2. Descamps appealed his sentence on the grounds that, regardless of the prosecutor's remarks during his plea colloquy, the California conviction could not serve as an ACCA predicate because it contained no element of unlawful entry. Relying on its decision in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), the Ninth Circuit concluded that the sentencing court was permitted to find the missing element based on the plea colloquy and affirmed the sentence. Pet. App. 4.

SUMMARY OF ARGUMENT

I. In *Taylor v. United States*, 495 U.S. 575 (1990), this Court established a categorical approach for determining whether a defendant's prior conviction qualifies as an ACCA predicate crime. Under this approach, a sentencing judge looks only to the statutory definition of the prior offense and asks whether the elements of that crime constitute an ACCA predicate offense. This Court has permitted a "modification" of the categorical approach when a statute encompasses several different crimes with different elements, some of which qualify as ACCA predicate offenses, and some of which do not. In this "narrow range of cases," a judge may look to certain documents to determine which of the possible statutory violations was the basis of the conviction. *Id.* at 602.

In *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), the Ninth Circuit revised the Court's traditional modified categorical approach in two respects. First, it extended the approach to a new type of statute. Previously, this Court had only applied the approach to so-called "divisible" statutes that define multiple offenses with alternative elements. But the Ninth Circuit extended the approach to statutes that are altogether missing an element of the ACCA predicate offense. That innovation required the second revision: Rather than looking to the record of conviction simply to identify which particular offense was the basis of the conviction, the Ninth Circuit authorized courts to examine "to some degree the factual basis" underlying the conviction to decide whether the defendant would have been convicted of the ACCA

predicate offense had he been tried under the federal definition. *Id.* at 935.

II. These revisions to the modified categorical approach contravene this Court's precedent and the text of the ACCA, render the statute unconstitutional as applied in many cases, and will make administration of the ACCA even more difficult and unfair than it already is.

A. The Ninth Circuit's version of the modified categorical approach does exactly what this Court's categorical approach precedents endeavor to prevent – it requires courts to examine the facts and evidence underlying a specific conviction to decide whether those facts would support a conviction in a hypothetical prosecution for the ACCA predicate offense. The Ninth Circuit recognized as much, but understood the Court's modified categorical approach to be less of a modification than an exception, permitting courts to undertake essentially the opposite of the categorical approach in appropriate cases. That misreads precedent. The modified categorical approach is, as its name implies, a modest modification to the general approach this Court has designed to implement the ACCA. It simply allows courts to examine the record of conviction to determine – in cases where the statute of conviction defines multiple offenses with alternative elements – *which* offense the defendant was actually convicted of. It is not a license to conduct a factual inquiry to decide the results of a hypothetical prosecution that never took place, under a state statute that does not exist.

B. The Ninth Circuit's contrary approach cannot be reconciled with the text of the ACCA. The ACCA

applies to a person who "'has three previous convictions' for – not a person who has committed – three previous violent felonies or drug offenses." *Taylor*, 495 U.S. at 600 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). Even if the record revealed that petitioner had admitted to facts that would have led to a conviction for generic burglary had he actually been tried for that offense, that simply is not the same thing as actually being convicted of generic burglary. A defendant who is caught breaking into a house to steal a television, but is only charged with trespass, is not convicted of burglary even if the jury necessarily finds, or the defendant admits to, facts that would have supported a conviction for the more serious offense.

C. The Ninth Circuit's rule would also result in Sixth Amendment violations in a great many cases. Any fact, other than the fact of a prior conviction, that increases a defendant's maximum sentence must be found by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The narrow exception for the fact of a prior conviction does not authorize a federal sentencing court to impose a greater sentence based on his finding that a jury would have found a missing (and unnecessary) element had it been asked to do so.

D. This Court has recognized that allowing sentencing judges to examine the factual background of prior convictions would create "practical difficulties and potential unfairness." *Taylor*, 495 U.S. at 601. The Ninth Circuit's rule would be challenging to administer, as courts would have to determine the veracity and import of evidence that did not relate to elements of the charged offense. Because the

defendant would have had little incentive to contest such evidence, it would be inherently unreliable. Moreover, allowing a sentencing judge to reexamine the factual basis for a guilty plea risks unfairness. Defendants and prosecutors often agree to plea bargains under which the defendant pleads guilty to less serious offenses. Treating those convictions, for federal sentencing purposes, as convictions for more serious offenses strips the defendant of the benefit of his bargain and interferes with the state's prosecutorial discretion.

E. The Ninth Circuit justified its rule in part on the ground that there is no logical difference between a statute that lists multiple crimes containing alternative elements (which all agree is subject to the modified categorical approach) and a statute that is missing an element altogether. That assertion is wrong, but even if it were correct, that would be reason to abandon the modified categorical approach, not to expand it.

ARGUMENT

I. The Ninth Circuit Construed This Court's "Modified Categorical Approach" To Permit A Dramatic Exception To The Categorical Approach's Limited Elements-Based Inquiry.

A. The Categorical Approach Is Limited To Examination Of The Elements Of The Prior Statute Of Conviction.

This Court has established a "categorical approach" to determine whether state convictions trigger sentence enhancements under the ACCA and certain other federal statutes. *See Taylor v. United States*, 495 U.S. 575, 600 (1990). Under this approach, sentencing courts compare the elements of the federal ACCA predicate offense with the elements of the prior crime for which the defendant was convicted. *Id.* The categorical approach thus requires sentencing courts to consider the prior offense "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008).

The categorical approach is necessary for three reasons. First, it effectuates the ACCA's text, since "the language of [the ACCA] generally supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to facts underlying the prior convictions." *Taylor*, 495 U.S. at 600. Second, the categorical approach avoids the potential Sixth Amendment violations that could occur if sentencing

judges were permitted to make "a disputed finding of fact about what the defendant and state judge must have understood as the factual basis" of the state conviction. *Shepard v. United States*, 544 U.S. 13, 25 (2005) (plurality opinion). Third, the categorical approach avoids the "practical difficulties and potential unfairness" that would result if sentencing courts were free to draw conclusions about the facts underlying each state conviction, rather than considering only the elements that were necessary to sustain that conviction. *Taylor*, 495 U.S. at 601.

B. The Court Has Adopted A Modified Categorical Approach For Alternative-Element ("Divisible") Statutes.

This Court has modified the categorical approach in "a narrow range of cases where a jury was actually required to find all the elements" of the federal offense. *Taylor*, 495 U.S. at 602.

That circumstance arises, the Court has explained, when the statute under which the defendant was convicted "refers to several different crimes" by defining some of its elements in the alternative. *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009). For example, in *Nijhawan*, the Court discussed a Massachusetts statute for "Breaking and Entering at Night," which criminalizes breaking into four alternative places: a "building, ship, vessel or vehicle." *Id.* at 35. Because the prosecution could obtain a conviction by proving any one of these four elements, the Court explained, the statute establishes several distinct crimes. *Id.* Significantly, only some of those crimes constitute generic burglary: violations involving one of the statute's alternative elements (a building) would amount to generic

burglary, whereas other violations (*e.g.*, involving a vessel) would not. *Id.*

The mere fact of conviction under such an alternative-element statute (sometimes called a "divisible" statute) will not reveal which of the various crimes defined by the provision was the basis of the defendant's conviction. Ordinarily, under the categorical approach, that would preclude the conclusion that the defendant had been convicted of generic burglary and bar an ACCA enhancement.

But the Court modified the categorical approach for the "narrow range of cases" presenting this problem. *Taylor*, 495 U.S. at 602. The Court's "modified" categorical approach permits sentencing courts to "determin[e] which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction." *Nijhawan*, 557 U.S. at 41. Under this approach, a sentencing judge may look to a limited set of documents – the so-called *Shepard* documents – to determine which of the alternative crimes was the basis of the conviction. *See Shepard*, 544 U.S. at 16 (permitting courts to examine for this purpose "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented"); *see also Nijhawan*, 557 U.S. at 35. Having determined which combination of the statutory elements was the basis of the prior conviction, the trial court can then compare those elements with the elements of the ACCA predicate offense.

Accordingly, as its name suggests, the *modified* categorical approach is a modification of the way in

which a categorical inquiry is conducted, not a repudiation of the basic premises of the categorical approach. It simply permits the sentencing court to examine the record of conviction to resolve an ambiguity about which offense, when a single statutory provision defines multiple offenses with alternative elements, the defendant was actually convicted of.

C. The Ninth Circuit Extended The Modified Categorical Approach To Missing-Element Statutes And Revised The Nature Of Its Inquiry.

Like the statute discussed in *Nijhawan*, the California burglary statute at issue here lists a series of places that can be burglarized, some of which could not form the basis of generic burglary. *See* Cal. Penal Code § 459 (1978). It is common ground that sentencing courts may apply the modified categorical approach to determine whether a defendant was convicted of burglarizing a building or structure (which would amount to generic burglary) instead of a vehicle (which would not). *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 926 (9th Cir. 2011) (en banc).

However, the California burglary statute differs from generic burglary in a second respect as well. Whereas generic federal burglary requires that the defendant's entry be "unlawful or unprivileged," that element is entirely missing from California's burglary statute. A defendant may be convicted of burglary under California law without any showing that his entry was unlawful. See, e.g., *People v. Salemme*, 2 Cal. App. 4th 775, 780 (1992) (lawfully entering a

store during business hours with intent to steal constitutes burglary in California).

A traditional application of the modified categorical approach in such a case would preclude a sentence enhancement. Because the element of unlawful or unprivileged entry is missing altogether from the state statute, there is no combination of the elements of California burglary that will add up to generic burglary as defined by federal law. The modified categorical approach cannot, therefore, yield a determination that a particular defendant's conviction rested on elements constituting generic burglary.

In *Aguila-Montes*, the Ninth Circuit acknowledged that this Court has never applied the modified categorical approach to statutes that omit an element altogether (so called "missing-element statutes"), and that this Court's precedent "provides support for limiting the modified categorical approach to divisible statutes." 655 F.3d at 931. The court nonetheless concluded that sentencing courts have the authority to apply a "revised modified categorical approach" to missing-element statutes. *Id.* at 940.

Specifically, the Ninth Circuit held that a sentencing court may conclude that a defendant was convicted of generic burglary, even under a state statute missing an essential element of the federal offense, if the court is "confident" that "in the course of finding that the defendant violated the statute of conviction . . . the factfinder [was] *actually required to find the facts satisfying* the elements of the generic offense." 655 F.3d at 936. The Ninth Circuit acknowledged that in a missing-element case, a jury

would never be charged that it must find the missing element in order to convict. *See id.* at 929. But the court hypothesized that it may be possible to determine that, given the prosecutor's "theory of the case," the jury must have found facts that would satisfy the missing element. *Id.* at 937.

The Ninth Circuit recognized that this inquiry differs dramatically from the one authorized by the categorical approach, allowing a court to do precisely what the categorical approach was designed to avoid – examine the facts underlying a prior conviction. *Aguila-Montes*, 655 F.3d at 928-29. But it reasoned that the *Taylor* line of cases allows sentencing courts to "consider[] to some degree the factual basis for the defendant's [state] conviction," so long as the inquiry is confined to (i) examining the "limited universe of *Shepard* documents," and (ii) discerning "what the jury must have found" (as opposed to what the sentencing court believes the facts to be). *Id.* at 935.

II. The Modified Categorical Approach Does Not Apply To Missing-Element Statutes.

The Ninth Circuit's approach to enhancing sentences based on prior convictions that are missing elements of their federal counterparts bears little resemblance to the categorical approach. The categorical approach asks only what the elements of the statute of the prior conviction were. But under the Ninth Circuit's approach to missing-element statutes, the elements of the crime of conviction become virtually irrelevant: depending on the factual allegations of a particular case, a defendant convicted of trespass or identity theft could be found to have been convicted of burglary. All that is required is that the sentencing court be confident that the jury

accepted the prosecution's theory of the case, and that based on those facts, the jury would have convicted the defendant in a hypothetical burglary prosecution.

That approach has no basis in the decisions of this Court or the text of the statute. Moreover, it must be rejected to avoid rendering the statute unconstitutional as applied to a great many cases (including this one) and to mitigate the practical difficulties and risk of unfairness that led this Court to adopt the categorical approach in the first place.

A. This Court's Cases Foreclose Applying The Modified Categorical Approach To Missing-Element Statutes.

This Court has applied the modified categorical approach only to alternative-element statutes. *See* Petr. Br. 19-26 (collecting cases). The principles animating those cases preclude the Ninth Circuit's expansion of the modified categorical approach to missing-element statutes.

1. The reasons that this Court adopted both the categorical approach, and a limited modification of it, require restricting the modified categorical approach to alternative-element statutes.

The categorical approach represents this Court's "conclusion about the best way to identify generic convictions in jury cases, while respecting Congress's adoption of a categorical criterion that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction." *Shepard v. United States*, 544 U.S. 13, 20 (2005); *see also James v. United States*, 550 U.S. 192, 202 (2007); *Taylor v. United States*, 495 U.S. 575, 600 (1990). The

modified categorical approach is not a repudiation of that conclusion. To the contrary, the Court has always treated the modified categorical approach as part of the categorical approach, not as an occasion to engage in the kind of factual inquiry that the categorical approach was adopted to avoid. *See Taylor*, 495 U.S. at 602; *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007) (characterizing the modified categorical approach as a "step of the *Taylor* inquiry").

As traditionally applied to alternative-element statutes, the modified categorical approach is consistent with the imperatives of the categorical approach. As in any application of the categorical approach, a sentencing judge applying the modified categorical approach to an alternative-element statute is not seeking to determine the conduct underlying the conviction; she is only ascertaining which of several offenses defined in a single statutory provision is the basis of the conviction.

Applying that traditional modified categorical approach to missing-element statutes is pointless. By definition, no combination of statutory elements in such a statute will ever result in a conviction for the ACCA predicate offense. Accordingly, to permit enhancements in cases like this one, the Ninth Circuit has not only extended the modified categorical approach to a new kind of statute, but also has fundamentally altered the nature of the inquiry. Rather than ask which *elements* of the California statute were found by the jury, the Ninth Circuit asks what *other facts* the jury presumably found based on the prosecutor's allegations or the defendant's admissions in a particular case. That is

precisely the kind of "hypothetical" inquiry the Court rejected in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2586 (2010) (a federal immigration judge may not "enhance the state offense of record just because facts known to [her] would have authorized a greater penalty under either state or federal law").

2. The Ninth Circuit nonetheless purported to find support for its approach in this Court's statement that the modified categorical approach is intended to discern the facts a jury was "actually required" to find, or the facts a conviction "necessarily rested on." *United States v. Aguila-Montes*, 655 F.3d 915, 935-36 (2011) (en banc) (quoting *Taylor*, 495 U.S. at 602, and *Shepard*, 544 U.S. at 21). The Ninth Circuit understood this language to permit inquiry not only into the *elements* of the state offense, which the jury necessarily found, but also additional "*facts* the conviction 'necessarily rested' on in light of the [prosecution's] theory of the case." *Id*. at 937 (emphasis added). That interpretation is unsupportable.

The only facts a jury is "actually required" to find in order to convict are the elements of the offense. *See, e.g.*, *Patterson v. New York*, 432 U.S. 197, 205-06 (1977). As a consequence, a conviction only "necessarily rest[s]" on those elements. The Ninth Circuit thought that these phrases had a broader meaning, encompassing subsidiary facts a jury must have found in a particular case in order to find the defendant guilty. But that reading disregards the context of the Court's statements. In *Taylor*, this Court said:

> We therefore hold that an offense constitutes "burglary" for purposes of a § 924(e) sentence

> enhancement if either its statutory definition substantially corresponds to "generic" burglary, or the charging paper and jury instructions actually required the jury to find *all the elements* of generic burglary in order to convict the defendant.

Taylor, 495 U.S. at 602 (emphasis added).

The Ninth Circuit stated that by "actually required," the Court "c[ould] not mean 'actually required by specific words in the statute of conviction.'" *Aguila-Montes*, 655 F.3d at 936. But that is precisely what the Court meant. The Court had just given an example of what it had in mind, pointing to an alternative-element statute that "include[d] entry of an automobile as well as a building." *Taylor*, 495 U.S. at 602. It explained that the modified categorical approach would be appropriate in such a case because a jury "necessarily had to find" one of those elements (entry into a car or a building) in order "to convict." *Id.* The modified categorical approach was thus strictly cabined by examining the alternative elements set forth in the statute, not facts underlying a jury verdict.

Shepard likewise focused on elements. There, the Court simply applied the principles established in *Taylor* to convictions based on guilty pleas. *Shepard*, 544 U.S. at 19. Rather than instructing lower courts to look to the jury instructions to decide which of the statute's alternative elements the jury was "actually required" to find, the Court instructed courts to review the plea colloquy to decide which elements of the state statute the conviction "necessarily rested on." *Id*. at 21 (internal quotation marks omitted); *see also United States v. Shepard*, 348 F.3d 308, 309 &

n.1 (1st Cir. 2003) (describing the alternative elements at issue in *Shepard*).

B. Applying The Modified Categorical Approach To Missing-Element Statutes Is Inconsistent With The Text Of The ACCA.

Even if this Court's precedents were unclear – and they are not – the text of the ACCA would preclude the Ninth Circuit's approach.

As this Court has noted, the ACCA "refers to 'a person who . . . has three previous *convictions*' for – not a person who has committed – three previous violent felonies or drug offenses." *Taylor*, 495 U.S. at 600 (emphasis added) (quoting 18 U.S.C. § 924(e)(1)).[2] The word "conviction" is fatal to the Ninth Circuit's interpretation of the statute.

When a defendant is convicted under a statute that lacks one or more of the elements of generic burglary, it is simply impossible to say that he nonetheless has a "conviction" for generic burglary. He may have committed acts that could have supported a conviction for burglary. But there is a world of difference between having *committed* acts

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[2] Likewise, the statute requires a conviction that "is burglary," 18 U.S.C. § 924(e)(2)(B)(ii), which most naturally "refers to the elements of the statute of conviction, not to the facts of each defendant's conduct," *Taylor*, 495 U.S. at 600-01. Section 924(e)(2)(B)(i), this Court has noted, similarly "defines 'violent felony' as any crime punishable by imprisonment for more than a year that 'has as an element' – not any crime that, in a particular case, involves – the use or threat of force." *Id.* at 600 (quoting 18 U.S.C. § 924(e)(2)(B)(i)).

that constitute burglary and having been *convicted* of that crime. Most clearly, someone who broke into a home to steal a television, but was never prosecuted, was not "convicted" of burglary. The same is true of someone who burglarized a home but was prosecuted for something else – the burglar who is charged only with speeding on his way home from the crime scene does not have a "conviction" for burglary, even if he admitted to the crime when the police pulled him over. Likewise, in this case, even if petitioner had admitted that he engaged in conduct that would amount to generic burglary, he was not convicted of that offense. Instead, he was convicted under a California statute that, while labeling his offense "burglary," defines that crime in a way that omits an essential element of the generic crime.[3]

The Ninth Circuit has nonetheless concluded that so long as a judge is confident that a defendant admitted (or a jury found) all of the facts that would be necessary to sustain a generic burglary conviction, that is close enough. But a conviction requires more than findings of fact. A judge cannot find a defendant guilty of burglary when all he has pleaded guilty to is identity theft, even if the defendant does not dispute in his plea colloquy that he obtained the victim's driver's license by breaking into a house. To obtain a conviction for the more serious offense, the

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[3] Had Congress wanted to, it could have drafted a statute that focused upon the facts underlying past convictions. *See, e.g.*, *Nijhawan v. Holder*, 557 U.S. 29, 38-39 (2009) (explaining that Congress intended a circumstance-specific approach in 8 U.S.C. § 1101(a)(43)(M)(i), which references prior crimes "*in which the loss to the victim or victims exceeds* $10,000").

prosecution must do more than secure assent to the requisite facts – it must charge the defendant with the greater offense, and if the defendant chooses not to plead guilty to that distinct crime, it must prove all of the elements of the higher crime to a jury beyond a reasonable doubt.

C. Applying The Modified Categorical Approach To Missing-Element Statutes Would Render The ACCA Unconstitutional In Many Applications.

The Ninth Circuit's interpretation would also render the ACCA unconstitutional as applied in a great many cases, including this one.

1. The ACCA Is Constitutional Only To The Extent That It Limits Judicial Fact-Finding To Ascertaining The Fact Of A Prior Conviction And Its Elements.

The Sixth Amendment generally requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The ACCA subjects a defendant to a substantially greater maximum penalty if a federal sentencing judge makes a factual determination that the defendant has three prior convictions for predicate offenses. 18 U.S.C. § 924(e)(1). Accordingly, the ACCA would seem to violate the Sixth Amendment. The only reason it does not is that this Court has retained, at least for the time being, a limited exception to the general Sixth Amendment rule: a judge may find the "fact of a prior conviction." *Apprendi*, 530 U.S. at 489-90 (carving

out that exception in light of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). The rationale for the exception is that the defendant already received the protections of the Sixth Amendment in the prior trial. *Apprendi*, 530 U.S. at 488.

Accordingly, at best, the ACCA is constitutional only to the extent it is construed to restrict judicial fact-finding to the narrow limits of the *Almendarez-Torres* exception.

2. The Traditional Application Of The Modified Categorical Approach To Alternative-Element Statutes Falls Within The Almendarez-Torres *Exception.*

Strictly speaking, an enhancement under the ACCA does not depend simply on the "fact of a prior conviction" – a court must find the fact of a *particular kind* of conviction, in this case burglary. But deciding *which* crime a defendant was previously convicted of does not exceed the bounds of the *Almendarez-Torres* exception. For that reason, the categorical approach falls comfortably within the exception. Under the categorical approach, the sentencing judge "look[s] only to the fact of conviction," as permitted by *Almendarez-Torres*, and "the statutory definition of the prior offense" to determine its elements, *Taylor*, 495 U.S. at 602, a legal rather than a factual inquiry, *see James v. United States*, 550 U.S. 192, 214 (2007).

The modified categorical approach, as applied by this Court to alternative-element statutes, likewise falls within the permissible bounds of the *Almendarez-Torres* exception. Its only function is to assist the sentencing court in the first step of the

categorical approach: helping to identify *which* state crime, among the several defined in the alternative-element statute, constituted the actual crime of conviction. Having identified the elements of that crime, the court simply compares those elements to the elements of the ACCA predicate.

Under both versions of the categorical approach, then, the federal sentence enhancement is predicated entirely on facts that the Sixth Amendment required the prosecution to prove beyond a reasonable doubt to the jury in the prior proceeding.

3. Applying The Ninth Circuit's Version Of The Modified Categorical Approach To Missing-Element Statutes Exceeds The Bounds Of The Almendarez-Torres *Exception.*

The Ninth Circuit's version of the modified categorical approach permits a sentencing court to go well beyond determining the fact of a prior conviction. Indeed, the Ninth Circuit developed its rule precisely because it recognized that the fact of a prior California burglary conviction, standing alone, cannot support an ACCA enhancement. *Aguila-Montes*, 655 F.3d at 917, 939.

The Ninth Circuit's approach therefore requires the sentencing court to examine the record of conviction to identify *facts* about what the defendant *did* – in this case, whether the defendant broke into the grocery store or simply walked in during normal business hours. But *Apprendi* made clear that whatever continuing validity *Almendarez-Torres* may have, it does not permit inquiry into the "*commission* of the offense." *Apprendi*, 530 U.S. at 496 (emphasis added). Yet that is exactly what the Ninth Circuit

permits, asking not what the elements of the crime of conviction were, but how the defendant committed the offense in this particular case and whether those subsidiary facts would constitute generic burglary.

The Sixth Amendment problem is not eliminated by requiring a judge to ask what subsidiary facts the original jury must have found, rather than allowing a judge to find facts anew. The Sixth Amendment contemplates only one way of determining what facts a jury found – charging the jury that it must unanimously find the facts necessary to justify conviction beyond a reasonable doubt. Reading the tea leaves to surmise what *else* the jury may have believed is a fool's errand; relying on the facts so surmised to increase the maximum statutory punishment for a crime is a Sixth Amendment violation.

The only reason this Court has permitted any reliance at all on the results of a prior criminal proceeding is because of the "certainty that procedural safeguards attached to any 'fact' of prior conviction." *Apprendi*, 530 U.S. at 488; *see also Jones v. United States*, 526 U.S. 227, 249 (1999). But a fact that is not an element of the offense is frequently not subject to "the adversarial process that our system counts on to produce just results." *Strickland v. Washington*, 466 U.S. 668, 696 (1984). The only thing a jury must agree upon unanimously, and the only facts the government must prove beyond a reasonable doubt, are the facts that constitute elements of the offense. *Patterson v. New York*, 432 U.S. 197, 210 (1977). Those protections do not apply to every fact a sentencing court may later conclude

the jury must have found. As Justice White once explained:

> In the case of burglary, for example, the manner of entering is not an element of the crime; thus, *Winship* would not require proof beyond a reasonable doubt of such factual details as whether a defendant pried open a window with a screwdriver or a crowbar. It would, however, require the jury to find beyond a reasonable doubt that the defendant in fact broke and entered, because those are the "fact[s] necessary to constitute the crime."

Schad v. Arizona, 501 U.S. 624, 656-57 (1991) (White, J., dissenting) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)); *see also Richardson v. United States*, 526 U.S. 813, 817-18 (1999). For a judge to later enhance a defendant's sentence for a subsequent crime on the grounds that the jury must have believed the defendant used a crowbar violates the Sixth Amendment.

The Sixth Amendment problems with the Ninth Circuit's approach are no less severe if a judge asks what facts the defendant admitted in the plea colloquy. Indeed, in *Shepard* this Court specifically rejected the Government's suggestion that a sentencing judge could "make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea," noting that this approach "raises the [Sixth Amendment] concern underlying *Jones* and *Apprendi*." *Shepard*, 544 U.S. at 25 (plurality opinion); *id*. at 27-28 (Thomas, J., concurring in part and concurring in the judgment).

Ignoring that caution, the Ninth Circuit assumes that the Constitution permits a sentence enhancement based on any fact a defendant states or admits (or, in this case, fails to object to) during a plea colloquy. This assumption is simply wrong. The constitutional question is not whether the defendant admitted some fact in a prior proceeding; it is whether the defendant knowingly and intelligently waived his Sixth Amendment right to a jury determination of that fact. *See Jones*, 526 U.S. at 242. If a defendant charged with trespass pleads guilty, but during the course of the plea colloquy admits to having broken into a home in order to steal a television, a court may not convict the defendant of burglary instead on the grounds that the defendant admitted to all the elements of the more serious offense.[4]

That is because in pleading guilty to the trespass charge the defendant waives his right to a jury determination of only the elements of trespass. *See United States v. Broce*, 488 U.S. 563, 569 (1989). A defendant does not knowingly and intelligently waive his right to contest a fact that is not an element in the present case and may only become consequential years later in a subsequent proceeding. *See, e.g.*, *Mitchell v. United States*, 526 U.S. 314, 324 (1999) ("A waiver of a right to trial with its attendant

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[4] If admission to a fact alone were sufficient, a court could direct a verdict of guilty any time a defendant admitted at trial to facts establishing the elements of an offense. But that obviously is not the law. *See, e.g.*, *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 410 (1947).

privileges is not a waiver of the privileges which exist beyond the confines of the trial.").

Such was precisely the case here. Before the California court, petitioner remained silent in the face of an assertion of fact that was neither an element of the crime to which he was pleading nor material in any way to his state conviction or sentence. Given that fact's irrelevance, his silence did not constitute a knowing and intelligent waiver of any Sixth Amendment right to have that fact determined by a jury when it eventually did become relevant in a later federal prosecution. An interpretation of the ACCA that leads to any other result would render the statute unconstitutional.

D. Applying The Modified Categorical Approach To Missing-Element Statutes Poses Significant Practical Difficulties And Risks Manifest Unfairness.

The Ninth Circuit recognized that applying ACCA enhancements is so complicated that "over the past decade, perhaps no other area of the law has demanded more of our resources." *Aguila-Montes*, 655 F.3d at 917. Yet its proposal to expand the inquiry performed by sentencing judges exacerbates, rather than resolves, the "practical difficulties and potential unfairness" of applying the ACCA. *Taylor*, 495 U.S. at 601.

1. The Ninth Circuit's Approach Raises Intractable Practical Difficulties.

a. The Ninth Circuit's approach requires federal sentencing judges to parse aged records of convictions to determine whether they contain proof that a jury found or a defendant admitted facts that, although

not elements of the offense of conviction, nonetheless satisfy the missing element of the federal offense. But the limited information in the records of conviction will often be vague or contested. Relying on this evidence at sentencing proceedings risks creating undesirable "mini-sentencing-trials" regarding the factual underpinnings of past convictions. *Shepard*, 544 U.S. at 36 (O'Connor, J., dissenting).

The practical difficulties created by the Ninth Circuit's approach arise in both the plea bargain and jury trial context.

Plea Bargains: The facts of this case illustrate the perils of the Ninth Circuit's approach in the plea bargaining context. In this case, the prosecutor stated that petitioner committed "breaking and entering of a grocery store." Pet. App. 40a. Petitioner neither explicitly accepted nor objected to these statements. The Ninth Circuit assumed that he remained silent because the statements were true, but his silence could just as easily reflect a justifiable belief that these facts were irrelevant to his conviction and sentence. Yet thirty years later a federal judge found Descamps' silence sufficient to prove that he had entered a structure unlawfully.

The problems created by the Ninth Circuit's rule are heightened when plea agreements incorporate extraneous documents by reference. *See, e.g.*, *People v. Holmes*, 32 Cal. 4th 432, 441 n.8 (2004) (encouraging defendants entering plea agreements to stipulate "to a factual basis to be accompanied by reference to a police report, reference to the probation report or preliminary hearing transcript, or reference to grand jury testimony" (citations omitted)). Not

only are the potential grounds for dispute over the meaning of the documents multiplied, so too is the risk of error. Consider, for example, a person who is arrested with items stolen from a home. The police report might suggest the defendant is guilty of both burglary and receipt of stolen property. But later investigation may exonerate the defendant of participation in the burglary, leading to a guilty plea to the offense of receiving stolen goods. As is common in California, the defendant might stipulate to the police report of his arrest as providing a factual basis for his plea, even though some of the report's implications are not accurate. After all, the report's suggestion that the defendant was guilty of burglary would be irrelevant to the acceptance of the plea. But years later, a judge reviewing this police report might erroneously conclude that the defendant committed burglary and apply a sentence enhancement not justified by the defendant's conduct.

It may be that courts could eventually develop rules that minimize the risk of error. Judge Berzon, for example, suggested that when there are legitimate grounds to dispute the best inference to be drawn from the record of conviction, due process might require holding a hearing to allow the defendant to present contrary evidence. *Aguila-Montes*, 655 F.3d at 962 (Berzon, J., concurring in the judgment). But such "mini-sentencing-trials" are precisely what the categorical approach was designed to avoid. The work required to develop a body of law to govern judicial consideration of the uncounseled, unfocused statements in decades-old plea colloquies simply is not worth the candle.

Jury Verdicts: The practical difficulties of the Ninth Circuit's rule are no less severe in the context of jury verdicts. A general jury verdict of guilty demonstrates only that the jury found that the defendant committed all the elements of the charged crime. It is not an affirmation of the government's theory of the case or even the allegations of the charging documents. *See Richardson v. United States*, 526 U.S. 813, 817 (1999).

The Ninth Circuit hypothesizes that sometimes a court can be confident that the jury necessarily found a fact that was not an element of the offense of conviction because that fact was essential to the prosecution's "theory of the case." *Aguila-Montes*, 655 F.3d at 937. But in many cases, it may be far from clear what theory of the case the jury adopted. For example, the prosecution may allege that a defendant broke into an acquaintance's home and stole some jewelry. The defendant might claim that he was invited into the home and was given jewelry as a gift. In California, a jury could convict the defendant of burglary if they believed that he stole the jewelry, even if they accepted that he was invited into the home. In such a case, the fact of conviction alone does not prove that the jury accepted the part of the prosecution's theory of the case – unlawful entry – that is critical to the validity of an ACCA sentence enhancement.

b. Even when the prosecutor's theory of the case is uncontroverted, that does not prove that every fact on which the theory relies is therefore true. A defendant generally has no incentive to challenge facts that are unrelated to an element of the charged offense. During plea colloquies, a defendant may

choose not to contest non-elemental facts because they are irrelevant to his sentence, or because he does not want to risk offending the judge about to sentence him with protests regarding superfluous issues. In jury trials, a defendant may withhold even compelling evidence contesting non-elemental facts to avoid confusing the jury. In fact, evidentiary rules may bar him from presenting such evidence at trial. *See* Fed. R. Evid. 401 (providing that evidence is only relevant, and therefore admissible, if it is "of consequence in determining the action"); *id.* 403 (excluding evidence if it may "confus[e] the issues"). Thus, a defendant charged with burglary in California for entering a store with intent to steal may not have the opportunity, much less the incentive, to present evidence that the store was open for business at the time of his entry.

2. The Ninth Circuit's Approach Will Often Be Manifestly Unfair.

Opening the records of state court guilty pleas to later judicial fact-finding not only raises issues of administrability and reliability, it is also unfair to both criminal defendants and state prosecutors.

This Court has recognized that even when evidence might support a conviction for a greater crime, the prosecutor and defendant may legitimately agree to a plea to a lesser offense. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) ("The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties."). In such a circumstance, "it would seem unfair to impose a sentence enhancement as if the defendant had

pleaded guilty to burglary." *Taylor*, 495 U.S. at 602. Allowing a federal sentencing judge to base a sentence enhancement on a defendant's conduct, rather than what he pleaded guilty to, would undermine the finality and mutual benefit of these agreements.

For example, plea agreements for non-citizen defendants frequently reflect a careful calibration of the defendant's and the state's interests, with some plea deals specifically structured to avoid disproportionate immigration consequences. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) ("By bringing deportation consequences into [the plea bargaining] process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."); *see also St. Cyr v. INS*, 533 U.S. 289, 323 (2001). To allow a federal court to subsequently treat the resulting conviction as if the prosecutor had made the opposite choice "would denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns." *Carachuri-Rosendo*, 130 S. Ct. at 2588; *see also Oregon v. Ice*, 555 U.S. 160, 170 (2009) ("[T]he authority of States over the administration of their criminal justice system . . . lies at the core of their sovereign status.").

E. If There Is No Way To Distinguish Among Applications Of The Modified Categorical Approach, It Should Be Abandoned, Not Expanded.

The Ninth Circuit concluded that an expansive application of the modified categorical approach is acceptable because there is no conceptual difference between missing-element statutes and "divisible"

statutes. *Aguila-Montes*, 655 F.3d at 927. This is not correct, but even if it were, that would be reason to abandon the modified categorical approach completely, not expand it dramatically.

1. According to the Ninth Circuit, "[t]he only conceptual difference between a divisible statute and a non-divisible statute is that the former creates an *explicitly* finite list of possible means of commission, while the latter creates an *implied* list of every means of commission that otherwise fits the definition of a given crime." *Aguila-Montes*, 655 F.3d at 927. To take the Ninth Circuit's example, a statute criminalizing "harmful contact," by this logic, criminalizes a hypothetical list of types of harmful contact, such as simple battery, vehicular assault, and aggravated assault with a deadly weapon. *Id.* The Ninth Circuit reasons that because this Court has endorsed the use of *Shepard* documents to determine which "statutory phrase" a defendant was convicted of violating, *see Johnson v. United States*, 130 S. Ct. 1265, 1273 (2010), a similar inquiry is permissible to determine what part of an "implied list" of criminal conduct a defendant engaged in.

The Ninth Circuit ignores the critical feature of alternative-element statutes that distinguishes them from missing-element statutes: in an alternative elements case, the sentencing court can be confident that, because they are elements of the prior offense, the facts upon which the ACCA enhancement depends have been the subject of sustained and deliberate attention in the prior proceeding. The facts supporting the ACCA enhancement necessarily will have been unanimously found by a jury beyond a reasonable doubt after the careful scrutiny that only

arises when a judge instructs the jury that the fact is an element of the offense. No such confidence is warranted with respect to other facts that the prosecution might mention at some point in the proceedings.

Accordingly, the modified categorical approach must be limited to statutes that enumerate alternative *elements*. It cannot apply when a statute merely enumerates a "list of possible means of commission" of an element of an offense, as would happen under a theoretical statute that criminalized use of a "weapon," then defined that term to include a "'gun, axe, sword, baton, slingshot, knife, machete, bat,' and so on." *Aguila-Montes*, 655 F.3d at 927. Assuming that under such a statute, the type of weapon used would not be an *element* of the offense, but simply one of several means by which the government could prove the element of use of a "weapon," the jury would not be required to unanimously agree whether the defendant had used any particular weapon, say a gun, in the commission of the state offense. *See Richardson*, 526 U.S. at 817. If a federal sentence enhancement, however, applied only to a conviction for a prior firearms offense, the modified categorical approach could not be applied to decide whether the prior conviction actually involved a gun as opposed to some other kind of weapon, because that fact was not an element of the prior offense of conviction and was never subject to the constitutional protections that attach to elements. To allow a subsequent sentencing court to decide a fact (the use of a gun) that was not an element of the prior offense would, for all the reasons described above, run afoul of the text of the statute and frequently violate the Sixth Amendment.

2. All that said, if the Ninth Circuit were correct that there is no logical distinction between alternative- and missing-element statutes, that would be reason to jettison the modified categorical approach, not expand it. As noted above, allowing sentencing judges to find sentence-enhancing facts in missing-element situations contradicts the text of the ACCA, raises grave constitutional concerns, and creates substantial practical difficulties and potential unfairness. If, as the Ninth Circuit asserts, there is no conceptual difference between statutes that are missing an element and statutes that have alternative elements, then the same statutory, constitutional, and pragmatic concerns that require limiting the modified categorical approach would also require eliminating it.

In fact, abandoning the modified categorical approach altogether would avoid compounding the constitutional uncertainty surrounding the practice of enhancing sentences based on prior convictions not pleaded in indictments and proven at trial. Although this practice was endorsed in *Almendarez-Torres*, that decision "has been eroded by this Court's subsequent Sixth Amendment jurisprudence." *Shepard*, 544 U.S. at 27 (Thomas, J., concurring in part and concurring in the judgment). Given the uncertain constitutional foundation upon which ACCA sentence enhancements rest, limiting judicial fact-finding into past convictions to a strictly categorical inquiry would mitigate the tension between the statute and the Sixth Amendment. *Cf. id*. at 25-26 (plurality opinion) (recognizing that the doctrine of constitutional avoidance supports narrow construction of the modified categorical approach).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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