No. 03-9168

IN THE

Supreme Court of the United States

REGINALD SHEPARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

The Armed Career Criminal Act [18 U.S.C. § 924(e)] imposes a mandatory minimum sentence of 15 years imprisonment for a person convicted of being a felon in possession of a firearm [18 U.S.C. § 922(g)] where that person has previously been convicted of three violent felonies or serious drug offenses or both. *Taylor v. United States*, 495 U.S. 575 (1990) held that Congress intended a sentencing court to employ a categorical approach to determine whether a defendant's prior convictions qualify as predicates for this sentence enhancement, looking only to the fact of conviction and the elements of the statute of conviction, or to the charging document and the jury instructions to determine whether all of the elements of generic burglary (an enumerated violent felony) were necessarily adjudicated in the state court. The questions presented are:

1. Whether, where the defendant has pleaded guilty to a non-generic charge of burglary brought under a non-generic statute, there is no contemporaneous record of the guilty plea proceedings and the judgment of conviction reflects a general finding of guilty, the sentencing court is still bound by *Taylor*'s categorical method of application or may instead be required to conduct an inquiry – including an evidentiary hearing – into the facts underlying the conviction, to determine whether, in the guilty plea proceeding, both the defendant and the government believed the generic burglary was at issue?

2. If so, whether the sentencing court may be required to consider a version of these underlying facts found in any document in the court file such as an investigative police report or a complaint application and, if the facts alleged in the document are not challenged by the defendant, regard them as sufficiently reliable evidence that the defendant was convicted of a crime including all of the elements of generic burglary to support an Armed Career Criminal Act enhancement?

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OPINIONS BELOW

The first opinion of the United States Court of Appeals for the First Circuit is published at 231 F.3d 56 (1st Cir. 2000) and is reproduced in the Joint Appendix at 67. The first district court opinion is reported at 125 F. Supp. 2d 562 (D. Mass. 2000) and is reproduced in the Joint Appendix at 46. The second opinion of the United States Court of Appeals for the First Circuit is published at 348 F.3d 308 (1st Cir. 2003) and is reproduced in the Joint Appendix at 172. The second district court opinion is reported at 181 F. Supp. 2d 14 (D. Mass. 2002) and is reproduced in the Joint Appendix at 146.

STATEMENT OF JURISDICTION

The judgement of the First Circuit Court of Appeals was entered on November 3, 2003. Petitioner's request for rehearing and suggestion for rehearing en banc was denied on November 24, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation.

Section 922 of Title 18 of the United States Code provides in relevant part:

> (g) it shall be unlawful for any person –
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .
>
> to ship or transport an interstate or foreign commerce, or possess in or effecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 924 of Title 18 of the United States Code provides in relevant part:

> (e)(1) in the case of a person who violates Section 922(g) of this title and has previous convictions by any court referred to in Section 922(g)(1) of this title for a violent felony . . . such person shall be fined under this title and imprisoned not less than 15 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under Section 922(g).

Section 3553 of Title 18 of the United States Code provides in relevant part:

> (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The Court, in determining the particular sentence to be imposed, shall consider:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant

(2) the need for the sentence imposed:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for:

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines:

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under Section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement:

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

The issue in this case is whether federal sentencing courts may conduct wide-ranging inquiries into facts underlying a prior conviction in order to determine whether that conviction qualifies as a predicate offense under the Armed Career Criminal Act (18 U.S.C. § 924(e)). The Court previously

resolved this precise issue in *Taylor* v. *United States*, 495 U.S. 575 (1990). Pursuant to *Taylor*, which itself involved a guilty plea, federal courts considering ACCA enhancements based upon prior state convictions may look only the statute of conviction in order to determine whether those prior offenses qualify as "violent felonies." In cases where the previous conviction followed a jury trial, *Taylor* specifies that the sentencing court may look to the charge and the jury instructions to determine whether the adjudicated elements qualify that conviction as a violent felony and therefore an ACCA predicate offense.

The District Court here, relying upon *Taylor*, twice refused to impose the ACCA enhancement. That enhancement would have extended petitioner's sentence from a maximum of ten years for his federal felon-in-possession charge, to a mandatory minimum of fifteen years with a maximum of life in prison. The First Circuit twice reversed the District Court, ultimately ordering the District Court to impose the ACCA enhancement. The First Circuit's opinions take impermissible liberties with *Taylor*'s holding, raise grave constitutional questions in the wake of *Jones v. United* States 526 U.S. 227 (1999). *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), and make manifest the same inefficiencies and inequities that *Taylor* sought to avoid.

The District Court imposed and reaffirmed its sentence after careful consideration of the factors set forth in 18 U.S.C. § 3553(a), including the nature and circumstances of the offense and the history and characteristics of the petitioner. On that basis, the District Court departed upwards to reflect the seriousness of the petitioner's prior criminal history. For petitioner, who has completed service of 46 months in prison, that sentence has proved successful under the factors specified in 18 U.S.C. § 3553(a)(2), including protection of the public, deterrence, and access to needed drug treatment. The First Circuit's rulings would unjustifiably and broadly

expand the imposition of extensive mandatory minimum terms in cases like those of petitioner, who would be reincarcerated for a period of no less than 10 additional years. Because this expansion is wholly unjustified, reversal is warranted.

A. Statutory Background

Under 18 U.S.C. § 922(g)(1), it is unlawful for a person who has previously been convicted of a felony to possess a firearm. The maximum sentence of imprisonment for a violation of § 922(g)(1) is ten years. *Id.* § 924(a)(2). A defendant, convicted for a violation of § 922(g)(1) may, however, be subject to the sentence enhancement provision of the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e). Under the ACCA, a person convicted of being a felon in possession of a firearm is subject to a mandatory minimum prison sentence of fifteen years if he has "three previous convictions by any court . . . for a violent felony or serious drug offense." *Id.* Section 924(e) specifies no maximum sentence. Under the ACCA, the term "violent felony" means any crime punishable by a term of imprisonment exceeding one year and, *inter alia*, "is burglary." *Id.* § 924(e)(2)(B)(ii).

> [A] person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of [1] unlawful or unprivileged entry into, or remaining in, [2] a building or structure, [3] with intent to commit a crime.

Taylor, 495 U.S. at 599[1]. These are the elements of the offense of "generic" burglary. *Id.*

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[1] *See also* United States Sentencing Guidelines § 4B1.4, Application Note

B. Factual Background

At the behest of a cooperating witness, petitioner Reginald Shepard sold a firearm and ammunition to an undercover ATF agent in October 1995. Petitioner was indicted in September 1998 for a violation of § 922(g)(1). Petitioner, who was detained pending trial, pleaded guilty to the one count indictment on March 3, 1999. On July 14, 1999, the district court rejected the government's request to apply the ACCA, and sentenced petitioner to 46 months in prison followed by three years of supervised release.

The District Court based its discretionary sentence on extensive findings about petitioner's personal background and criminal history. The court noted that, while petitioner had an extensive criminal history which included several convictions for breaking and entering, beginning when he was eighteen years old, his crimes where those of a desperate addict. *See United States v. Shepard*, 125 F. Supp. 2d 562, 564-65 (D. Mass. 2000) ("*Shepard I*"); J.A. 49-50, 65. The crimes were opportunistic and unplanned, had little chance of success and resulted in immediate apprehension. *See id.*, J.A. 51. None of his prior offenses involved the use of a gun. *See id.* at 572; J.A. 64. They mostly involved "shoplifting, trespassing, motor vehicle infractions, receiving stolen property, breaking and entering." *Id.*, J.A. 51 & n.5. The root of petitioner's criminal conduct was petitioner's drug use which began at age sixteen when he moved out of his home and withdrew from school after years of witnessing his alcoholic father physically abuse his mother. *See id.*, J.A. 49-50. After his father was thrown out of the house, when Shepard was ten years old, his mother became involved with another man who continued the abuse including petitioner and his sister. *See id.*, J.A. 49. At sentencing, petitioner represented to the court that he had voluntarily stopped using drugs in 1996 and was supported in this claim by a strong showing of family and friends who appeared on his behalf. *See id.*, J.A. 50, 56.

Petitioner discharged his sentence on January 25, 2002. While imprisoned, petitioner satisfactorily completed a 500-hour drug abuse recovery program. He is currently under supervised release until January 2005. Following his release from prison, petitioner married Regina Chaves Shepard. On April 2, 2003, their daughter Aliana Shepard was born. Mrs. Shepard's six year old daughter lives with the Shepards in Boston. Both petitioner and Mrs. Shepard are employed. Petitioner, now 42 years of age, works at Consolidated Delivery & Logistics in Boston and serves in two capacities. From 4:00 p.m. until midnight he is a warehouse supervisor and from midnight to 3:00 a.m. he is a delivery driver. During the mornings, while Mrs. Shepard is at work, petitioner cares for their daughter. Add. C, Regina Shepard Aff., Appellee Reginald Shepard's Mot. for Stay of Issuance of Mandate Pending Filing of Pet. for Cert., 02-1216 (1st Cir. filed Dec. 1, 2003).

C. Opinions Below

1. Petitioner's presentence report ("PSR") recommended an offense level of 14 (prohibited person, U.S.S.G. § 2K2.1(a)(6)(A)) and a criminal history category of VI, based on 39 criminal history points. 125 F. Supp. 2d at 564, J.A. 49. The Probation Department refused to impose a sentence enhancement under the ACCA, despite prosecution objection and review of the police incident reports and complaint applications. *Id.* at 566; J.A. 52. After deducting two points from the offense level for acceptance of responsibility (*id*; U.S.S.G. § 3E1.1[a]), the PSR recommended a guideline range of 30 to 37 months. At sentencing, the parties agreed that, absent enhancement pursuant to the provisions of § 924(e), 30 to 37 months was the applicable guideline range. J.A. 18.

The PSR recounted petitioner's criminal history, including a factual description of his prior convictions for breaking and entering drawn from certified copies of incident reports and

applications for complaint taken from state court files.[2] S.J.A. 195-213. Relying upon the facts set forth in the PSR and supplemented by certified copies of police reports and complaint applications, the prosecution objected to the fact that the PSR did not calculate petitioner's sentence in accordance with the ACCA and U.S.S.G. § 4B1.4. S.J.A. 237-43. Petitioner argued that the inclusion of factual allegations drawn from incident reports and complaint applications was inappropriate, unreliable and could not be considered in light of *Taylor*, 495 U.S. at 600; *United States v. Martinez-Cortez*, 988 F.2d 1408, 1413 (5th Cir. 1993); and *United States v. Dueno*, 171 F.3d 3, 7 (1st Cir. 1999). S.J.A. 243.

At the sentencing hearing, the prosecution asserted that at least three, and as many as five, of petitioner's prior convictions for breaking and entering constituted generic burglaries and thus qualified as violent felonies under the ACCA. J.A. 21-26, 28-30. Each of these prior convictions were the result of guilty pleas to breaking and entering statutes whose terms were broader than statutory definitions of the offenses were broader than generic burglary ("nongeneric burglary").[3] The ambiguity of petitioner's prior

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[2] "Certification" indicated only that the document was an accurate copy. Such certification in no way established the actual nature of the crimes to which petitioner pled. *United States v. Shepard*, 181 F. Supp. 2d 14, 22 (D. Mass. 2002) ("*Shepard III*"), J.A. 159.

[3] Each of the convictions at issue was for violation of one of two statutes, which provide in relevant part:

> Mass.Gen.Laws ch. 266, § 16 – Breaking and entering at night
>
> Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, or who attempts to or does break, burn blow up or otherwise injures or destroys a safe, vault or other depository of money, bonds or other valuables in any building, vehicle or place, with intent to commit a larceny or felony, whether he succeeds or fails in the perpetration of such larceny or felony, shall be punished by imprisonment in the state prison for not

pleas was exacerbated by the fact that all but one of the subsequent applications for complaint were in the boilerplate language of the nongeneric statutes. Thus, it is impossible to ascertain from the state court record whether petitioner was ever charged with, much less pleaded guilty to generic burglary. At no point, during the prior state court proceedings or the federal sentencing did petitioner "concede the facts on which the government now relies." 125 F. Supp. 2d at 566, J.A. 53. Instead, petitioner "expressly contested any characterizations of these convictions that went beyond the words of the complaints." *Id.*, J.A. 53. Nonetheless, the prosecution urged the District Court to resolve these ambiguities by relying upon the incident reports and complaint applications from the case files to conclude that petitioner in fact broke into buildings and that his prior convictions were therefore for generic burglary. J.A. 21-26, 28-30.

Citing *Taylor* and *United States v. Dueno*, 171 F.3d 3 (1st Cir. 1999), the District Court indicated that it could not lawfully resolve these ambiguities in the manner suggested by the prosecution. J.A. 27-28. However, the District Court did not immediately impose sentence and instead afforded the prosecutor an opportunity to move for an upward departure based upon petitioner's criminal history. J.A. 30. The prosecution accepted the court's invitation and moved for an upward departure pursuant to U.S.S.G. § 4A1.3 (permitting

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more than twenty years or in a jail or house of correction for not more than two and one-half years.

Mass.Gen.Laws ch. 266, § 18 – Dwelling house; entry at night; breaking and entering in day time; weapons; punishment.

Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years. . . .

upward departures whenever the criminal history category understates the seriousness of the defendant's criminal record). *See*, *Shepard I*, 125 F. Supp. 2d at 563, J.A. 47-48.

When the sentencing hearing reconvened on July 14, 1999, the District Court addressed the prosecution's motion for an upward departure. The prosecution asked for departure from offense level 14 to level 24 and a resulting sentence of 120 months. J.A. 33-34. The District Court held that the requested departure did not comply with 18 U.S.C. § 3553(a) which provides: "The Court shall impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in paragraph two (2) of this subsection."[4] The District Court based its upward departure upon its extensive review of petitioner's criminal history and personal characteristics. The court noted that, while petitioner had an extensive criminal history, the circumstances relating to petitioner's difficult upbringing, the nature of his crimes, and his efforts to defeat his drug addictions were compelling reasons not to depart upward the full ten levels requested by the government. *See Shepard I*, 125 F. Supp. 2d at 571-72, J.A. 64-66.

Accordingly, the District Court departed upward two levels, settling on a guideline range 37 to 46 months. *Id.* at 572, J.A. 65-66. The District Court did not impose an ACCA enhanced sentence, concluding that the facts presented in the incident reports and complaint applications – "the location of the breaking and entering – were not necessary to his

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[4] Section 3553(a)(2) provides that the court shall consider:

"(2) The need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . ."

[petitioner's] state plea." *Id.* at 569-70, J.A. 59-60. Because the facts underlying the guilty pleas were "neither litigated nor conceded" by petitioner, the District Court held that reliance on those alleged facts "violates the policies articulated by the Supreme Court in *Taylor*, and subsequent First Circuit precedent." *Id.* at 570, J.A. 60-61.

The District Court imposed a sentence designed to afford petitioner an opportunity to address his addiction. "While Shepard's record suggests recidivism, it also suggests an out of control drug addict. . . . Whatever sentence I impose must include serious attention to Shepard's addiction." *Id.* at 572, J.A. 65. Because the Probation Department reported that the Bureau of Prisons would require a sentence of at least 46 months in order for petitioner eligible for its "intense drug treatment program," *id.*, J.A. 65, the District Court sentenced petitioner to 46 months in prison, with three years of supervised release to follow. In addition, the court directed that petitioner participate in a 500 hour Comprehensive Drug Treatment Program offered by the Bureau of Prisons.[5] *See id.* at 564, 572; J.A. 49, 66.

2. The prosecution appealed the District Court's decision not to impose the ACCA fifteen-year mandatory minimum enhancement, "arguing that the district court erred by refusing to consider the police reports and complaint applications…" *United States v. Shepard*, 231 F.3d 56, 62 (1st Cir. 2000) ("*Shepard II*"), J.A. 74. Because petitioner's prior convictions were the result of guilty pleas to nongeneric state breaking and entering statutes, the First Circuit determined that it was necessary to examine "case specific documents" in order to resolve uncertainty regarding whether the convictions were for "violent felonies." *Id.* at 65, J.A.80. Although the First Circuit acknowledged the ambiguity of the statutes of

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[5] Petitioner complied, completing the BOP's comprehensive drug treatment program and writing to the judge periodically to report on his progress. Resentencing Proceedings Tr. at 2-4 (D. Mass. Dec. 13, 2001).

conviction, it disagreed with the District Court's adherence to *Taylor*'s holding. Instead, the First Circuit declared that *Taylor* failed to "address the extent to which a sentencing court can go beyond the fact of conviction, for the purpose of determining an ACCA enhancement, when a defendant has *pled guilty* to a charge based on a statute that includes both violent and non-violent offenses within the meaning of the ACCA." *Id.* at 63, J.A. 77.

Turning to its own precedent, the First Circuit relied upon *United States v. Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992) and concluded that the sentencing judge should have evaluated the reliability of the incident reports and complaint applications as a basis for determining "whether the defendant and the government both believed that Shepard was entering guilty pleas to the generically violent crime of breaking and entering a building."[6] *Shepard II*, 231 F.3d at 67-68, J.A. 86. The First Circuit also held that such a fact-finding inquiry was not foreclosed by petitioner's "*Taylor*-based categorical objection to the use of the complaint applications and police reports" because his objection did not "challenge the accuracy of the statements in those documents describing entries into buildings." *Id.* at 68, J.A. 87. The First Circuit vacated the sentence and remanded with the instructions that the District Court consider whether there was sufficient evidence, including the police reports and complaint applications, to conclude that the petitioner and the government both believed that it was generic burglary that the petitioner had pleaded

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[6] In *Harris*, the First Circuit ruled that:

> "…it would be appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested (in this context) in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime ("building") rather than the generically non-violent crime ("vehicle") was at issue."

964 F.2d at 1236.

guilty to. *Id.* at 70, J.A. 91. The First Circuit also specified that the preponderance of evidence standard was to be applied and that the prosecutor bore the burden of proof. *Id.* at 68, J.A. 87.[7]

3. On remand, the district court held two hearings. At the first hearing, petitioner filed an affidavit regarding the guilty pleas at issue. He stated, *inter alia*, that the incident reports and complaint applications played no part in any of his guilty pleas; that he had never been asked to admit the truth of the facts alleged therein and had never done so. J.A. 100-04; *see*, *United States v. Shepard*, 181 F. Supp. 2d 14, 19 (D. Mass. 2002) ("*Shepard III*"), J.A. 154. Petitioner's affidavit thus addressed the critical question on remand, which was whether the police reports and complaint applications had played any role in his prior plea proceedings and, on that basis whether he believed at the time that he was entering pleas to generic burglary offenses. *Shepard II*, 231 F.3d at 69, J.A. 88-89. The District Court afforded the prosecution additional time to respond to petitioner's affidavit and scheduled a second hearing.[8]

At the second hearing, the parties agreed that the central question on remand was: "What did Mr. Shepard plead to on those prior occasions?" *Shepard III*, 181 F. Supp. 2d at 17, J.A. 155. In response to petitioner's affidavit, the prosecution offered no evidence as to what occurred during petitioner's plea hearings and relied solely upon the certified copies of the

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[7] Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied over the dissent (without opinion) of Judges Selya and Lynch. This Court denied an interlocutory petition for a writ of certiorari after calling for a response to the petition. *Shepard v. United States*, 534 U.S. 829 (2001) (No. 00-8998).

[8] Citing *Commonwealth v. Quinones*, 608 N.E.2d 724 (Mass. 1993), the District Court observed that reconstruction of a guilty plea record, based on the state court's standard practice, is permissible and often persuasive evidence under Massachusetts practice. *Shepard III*, 181 F. Supp. 2d at 20 n.11, J.A. 155.

police reports and complaint applications. *Id.* at 23, J.A.160. The District Court held that the incident reports were not probative of the nature of petitioner's pleas unless they "had some tangible relationship to the plea colloquy." *Id.* at 22, J.A. 159. The prosecution conceded that it lacked any such evidence.

Accordingly, the District Court concluded that the incident reports and complaint applications themselves were not sufficient evidence that petitioner had adopted the facts alleged in the reports. Petitioner's affidavit was the sole evidence of what had actually transpired at the plea proceedings. The District Court therefore could not conclude that the elements of generic burglary had been adjudicated. *Id.* at 25-26, J.A.165. The court reimposed its prior sentence on remand, including the upward departure based upon petitioner's criminal history. *Id.* at 18, J.A. 150. The government appealed.

4. The First Circuit concluded that the District Court's decision not to apply the sentence enhancement was "clearly erroneous" and again remanded the case, this time with explicit instructions to re-sentence petitioner to the mandatory minimum fifteen year sentence prescribed by the ACCA. *United States v. Shepard*, 348 F.3d 308, 314-15 (1st Cir. 2003) ("*Shepard IV*"); J.A. 183.

The First Circuit dismissed the district court's reliance upon petitioner's affidavit stating that he had never admitted to the facts alleged in the police reports and its conclusion that "the police reports did not provide reliable evidence on the central question, 'what did the defendant plead to in the state court?'" *Id.* at 311, J.A. 176. Instead, the First Circuit, adopted a rationale based upon a Massachusetts Superior Court standing order, 2-86, despite the fact that the relevance and operation of that standing order had not been briefed by either party or discussed at oral argument. The First Circuit observed that the standing order provides that criminal defendants are to be given copies of the police reports and complaint applications

at arraignment. Thus, according to the First Circuit, there is a presumption that defendants are aware of the factual allegations contained therein. The court further held that unless the allegations contained in these reports are challenged by a defendant, there is a "compelling inference" that an otherwise guilty plea to a nongeneric statute constitutes an admission to the fact alleged in the police reports. Because petitioner's affidavit did not challenge the accuracy of the facts alleged in the police report, the First Circuit concluded that the reports were "unimpeached" and thus "carried the day." *Id.* at 314, J.A. 183.

SUMMARY OF ARGUMENT

In *Taylor v. United States*, 495 U.S. 575 (1990), the Court addressed the application of the ACCA to prior convictions obtained under non-generic burglary statutes which may or may not qualify as "violent felonies" under the ACCA. The Court unambiguously held that the ACCA does not permit sentencing courts to engage in a factual inquiry into the underlying convictions, but rather must apply a "categorical" approach looking only to the fact of conviction and the elements of the statute of conviction. If the elements adjudicated were those of generic burglary, the conviction qualifies as a "violent felony" under the ACCA. If it cannot be determined from the statute of conviction that these elements were necessarily adjudicated, the conviction does not qualify. The First Circuit, in this case, has ignored the Court's straightforward holding in *Taylor* and has instead required an impermissible factual inquiry into the conduct underlying the petitioner's prior guilty pleas to nongeneric burglary statutes to conclude that his conduct *actually* amounted to generic burglary. This factual inquiry is inconsistent with *Taylor*. For this reason the First Circuit's ruling cannot stand.

In addition to its erroneous interpretation of *Taylor*, the approach adopted by the First Circuit raises grave and

doubtful constitutional questions under the Fifth and Sixth Amendments. The First Circuit's approach involves judicial fact finding, under a preponderance of evidence standard, that leads to ACCA-based, mandatory minimum sentences that are significantly above the statutory maximum under 18 U.S.C. § 922(g)(1). The fact-finding mandated by the First Circuit goes far beyond inquiry into the mere fact of prior conviction and expressly requires an examination of record evidence and plea proceedings in order to make a *sui generis* assessment, long after the fact, of whether the prior convictions were "violent" versions of the felonies defendant had pled guilty to. This sort of judicial fact-finding violates a defendants Sixth Amendment right to a jury trial. The court's approach also violates the Due Process Clause of the Fifth Amendment because it permits a sentencing court to find these facts by a preponderance of the evidence and impermissibly shifts the burden to the defendant to prove that the ACCA enhancements do not apply.

The First Circuit has interpreted the Massachusetts breaking and entering statutes and petitioner's guilty pleas thereto as "generic" burglaries. In doing so, the Court of Appeals has incorrectly characterized those statutes and guilty pleas as ambiguous as to whether they constitute generic burglary. The Court's resolution of the purported ambiguity interprets petitioners' guilty pleas as pleas to a violent felony rather than a nonviolent felony. The First Circuit's own construct thereby violates the rule of lenity and for this additional reason must be reversed.

ARGUMENT

I. *TAYLOR* APPLIES TO THIS CASE AND THE CATEGORICAL APPROACH MANDATED IN THAT OPINION REQUIRES REVERSAL.

The First Circuit's opinions in this case reflect significant and untenable departures from this Court's ruling in *Taylor*, a

ruling that squarely applies here. As in *Taylor*, this case requires construction of § 924(e), which specifies the predicate offenses for ACCA enhancement, including "burglary." 495 U.S. at 590-96. As in *Taylor*, the prior convictions at issue here stem from state breaking and entering statutes that specify elements broader than generic burglary because those statues include enclosures other than buildings, such as vehicles and vending machines. *Id.* at 602; J.A. 52. As in *Taylor*, it is not possible to discern, from these broader state statutes, whether petitioner's guilty plea was to a generic burglary, or to a form of breaking and entering that did not involve a building. *Id.* at 602; J.A. 52.

On the basis of its plain reading of § 924(e) and the constitutional implications of a more expansive reading, *Taylor* calls for constitutionally required restraint on the part of sentencing courts in applying the ACCA in circumstances where the underlying convictions are based on non-generic "burglary" statutes. At bottom, *Taylor* precludes sentencing courts from making *sui generis* factual assessments of the defendant's underlying conduct in order to draw inferences about the qualifying status of those convictions for three important reasons. First, the facts upon which the First Circuit relies in characterizing petitioner's prior convictions as "violent felonies" were neither adjudicated nor necessary to the prior guilty pleas. Second, such exercises by sentencing courts run afoul the doctrine of constitutional avoidance. Third, such exercises risk "mini-retrials" of earlier convictions that are a waste of judicial resources, unfair to defendants and unlikely to produce consistent applications of the ACCA.

The uniform, categorical approach set forth in *Taylor* is required by the plain text of § 924(c)(2)(B). That statute defines "violent felony" and specifies that a "violent felony . . . is "burglary." *Id.* at 599. The absence of any qualification of this language led the Court to conclude that Congress intended uniform, federal definition of burglary that

does not turn on the vagaries of state definitions or labels (as in Massachusetts, for example, where the label is "breaking and entering"). *Id*. at 596-97. Drawing from the legislative history and a review of state criminal codes, the Court established a "generic, contemporary meaning of burglary that contains at least the following elements: (1) an unlawful or unprivileged entry into or remaining in, (2) a building or other structure, (3) with intent to commit a crime." *Id*. at 598 (citations omitted). These are the three elements of generic burglary which establish the benchmark for categorical analysis of prior convictions.

Taylor required that courts applying the ACCA look to this definition and only this definition in determining whether a prior conviction was for a generic burglary. *Id*. at 599. Accordingly, the court's prescribed method is a "categorical approach." The preferred method of making this categorical determination is to compare the elements of the statute of conviction to these generic elements on an "in" or "out" basis. But where the statutory elements are not generic, the conviction may still qualify where all the elements of generic burglary have been adjudicated. *Taylor* specifies that a in most cases sentencing court may look only to the statutory definition of the prior offense to make it categorical. *Id.* at 602.

Taylor therefore is definitive in holding that a prior conviction under a non-generic burglary statute qualifies as a violent felony only where the statute of conviction is unambiguously generic, or the sentencing court determines "that the jury necessarily had to find an entry of a building to convict." *Id.* at 602. *Taylor* plainly sets forth a standard that requires the sentencing court to conclude that the state court necessarily adjudicated all the *elements* of a generic burglary.

When elements of the statute of conviction "substantially correspond" to the elements of generic burglary, the sentencing court can infer that the defendant was "necessarily" found guilty of all the elements of generic

burglary. *Id.* at 600. Where the statute of conviction is non-generic, however, that inference obviously cannot be drawn. But if a jury has convicted the defendant, the inference that the defendant was necessarily found guilty of all of the elements of generic burglary can be drawn if it is supported by *both* a generic charging document and jury instructions which require the jury to find only generic burglary. *Id.* at 602.[9]

Adjudication of the required elements for earlier, qualifying convictions cannot be the province of a sentencing court under *Taylor*. Instead, the role of the sentencing court is only to determine whether that adjudication took place and whether the defendant was convicted of those elements, whether by plea or by jury determination. The inquiry continues to be solely a question of law. *United States v. Vidaure*, 861 F.2d 1337, 1340 (5th Cir. 1988), *cited with approval in Taylor*, 495 U.S. at 601.

A. The First Circuit Misreads *Taylor*.

The First Circuit's reasoning flows entirely from an erroneous premise; namely, that *Taylor* provides a blanket exception to its categorical requirements in cases involving guilty pleas obtained under non-generic statutes. In guilty plea cases, the First Circuit requires a sentencing court to find facts, on a preponderance of the evidence standard, to determine whether the defendant actually committed generic burglary. Pursuant to such findings, defendants would be exposed, as in this case, to significantly enhanced sentences far beyond the maximum penalty for the present charge.

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[9] In *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1998), *cited approvingly in Taylor*, 495 U.S. at 600, the Ninth Circuit considered and rejected an "intermediate" approach under which the sentencing court would consider only court records because that method suffered from most of the shortcomings of the fact finding method. *Sherbondy*, 865 F.2d at 1008 n.16

The First Circuit thus mistook *Taylor*'s holding and called for sentencing courts to determine not whether the qualifying elements were in fact adjudicated, but whether there are facts somewhere present in the record that would permit the sentencing court to reconfigure the prior non-generic conviction into generic burglary based on the defendant's conduct. It did not matter to the First Circuit that this court explicitly rejected fact-finding in *Taylor* for good and sufficient reasons clearly explained. It did not matter to the First Circuit that those facts were not themselves adjudicated in the state court. It did not matter to the First Circuit that sentencing courts would use such unadjudicated facts, long after the proceedings, retry the defendant on a charge never made against him in state court. And it did not matter to the First Circuit that none of constitutional procedural protections guaranteed to defendants, such as the right to have such findings made by a jury beyond a reasonable doubt, were attached to these after-the-fact determinations of such great consequence. Instead, it mattered only the documents used as a basis for such fact-finding were not patently unreliable.[10] The First Circuit's objective apparently was to insure that the ACCA be applied as broadly as possible to non-generic convictions. *Shepard IV*, 348 F.3d at 311-12, 314, J.A. 176-77, 181. Plainly, the exercise required by the First Circuit amounts to an adjudication of facts anew, not a determination of whether those facts were adjudicated below. Taylor permits only the latter and expressly disapproves of the former.

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[10] The First Circuit's final opinion in this case, for example, holds that it was clearly erroneous for the District Court not to find the police reports (and the subsequent applications for complaint which relied wholly upon on the police reports) sufficiently reliable to find that Mr. Shepard had pleaded guilty to generic burglaries. *Shepard IV*, 348 F.3d at 314, J.A. 182.

B. The First Circuit Has Adopted a Factual Inquiry Prohibited By *Taylor*.

Notwithstanding this Court's mandate that sentencing courts not engage in a factual inquiry with respect to determining which prior convictions qualify under the ACCA, the First Circuit requires just that. Indeed, the court embraces this inquiry, stating that "courts routinely resolve factual disputes during sentencing hearings [and] [w]e see no reason why disputes about the meaning of a defendant's guilty plea should be immune from that process, so long as the inquiry is consistent with the principles of Taylor." *Shepard II*, 231 F.3d at 69, J.A. 89-90. As justification for this subjective test, the First Circuit draws a distinction between a factual inquiry into the underlying conduct and a factual inquiry into what the defendant and the government believed at the time of the plea hearing. *See id.* at 69-70, J.A. 81. The latter, according to the court of appeals avoids the factual inquiry prohibited by *Taylor*. The First Circuit's distinction is without merit because, at bottom, the court's inquiry is focused on the defendant's conduct that resulted in the guilty plea and not on the elements that were necessarily adjudicated.

Taylor did not disapprove of fact finding for some purposes and allow it for others. The Court specifically rejected enhancement "on the ground that he actually committed a generic crime." *Taylor*, 495 U.S. at 600-02 ("looking only to the fact of the conviction and not to the particular facts underlying those convictions."). In the face of this prohibition, the First Circuit asked: "But how can one tell whether generic burglary was the crime of conviction if one does not look at what actually happened at the scene of the crime?" *Shepard IV*, 348 F.3d at 312, J.A. 178. The First Circuit simply circumvented *Taylor* with an argument that runs: if the defendant actually committed generic burglary,

then he was probably charged with generic burglary.[11] If he was charged with generic burglary, he probably admitted generic burglary in his guilty plea; therefore, his guilty plea was really a generic burglary conviction. It is plain that this is an enhancement bottomed on a finding of fact that the defendant actually committed generic burglary.[12]

This device creates a severe due process problem. Judges have found facts from a police report to determine that petitioner is guilty of generic burglaries he was never charged with, on the ground that, although he was convicted of a different crime, generic burglary is actually what was on his and the prosecutor's minds when he pled guilty. But a fundamental element of due process is actual notice of the true nature of the charge. *Smith v. O'Grady*, 312 U.S. 329, 334 (1941); *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) What the First Circuit has constructed is a truly unwitting guilty plea.

The First Circuit inquiry says nothing about the elements of conviction and so does not contribute anything to a categorical analysis. The *Shepard IV* inquiry converts the sentencing judge's task from that of ascertaining what elements were adjudicated in the prior proceeding to adjudicating those elements herself, *de novo*, years after the fact, on dubious evidence, employing a preponderance of the evidence standard. *Cf. Blakely*, 124 S. Ct. at 2536-37. The

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[11] The First Circuit papers over the fact that petitioner was not formally charged generically by positing a "compelling inference" that the non-generic complaint "embodied" the facts in the police report and that the plea was to the "embodied" complaint. *Shepard IV*, 348 F.3d at 314, J.A. 182.

[12] "There is surely an air of make-believe about this case. No one, and this includes Shepard and the district court, has seriously disputed that Shepard in fact broke into half a dozen or more buildings . . . . [H]e is just the kind of burglar whom Congress had in mind adopting the tough fifteen year minimum sentence for armed career criminals." *Shepard IV*, 348 F.3d at 311, J.A. 176.

district court recognized that this post hoc fact-finding was inimical to *Taylor*'s categorical analysis and refused to engage in it. *Shepard I*, 125 F. Supp. 2d at 569-70, J.A. 59-62; *Shepard III*, 181 F. Supp. 2d at 24, J.A. 162-63.

C. The First Circuit Shifts The Burden To The Defendant To Show That The Enhancement Does Not Apply.

While the court acknowledges that it is the government's burden to prove that a prior conviction qualifies under the ACCA, it places the burden on the defendant by starting with the presumption that a defendant is aware of the allegations made against him and that a plea of guilty is an admission of each fact alleged. It then requires that a defendant demonstrate that there was no mutual understanding between himself and the government that he was admitting to the elements of generic burglary at the time the plea was entered. The First Circuit found Shepard guilty of generic burglary based solely on the unlitigated allegations in old police reports.

The First Circuit's finding that a Massachusetts district court complaint "embodies" the facts in a police report submitted with a complaint application apparently rests on the court's understanding of the complaint and discovery procedures followed in the state district courts. This understanding was not derived from evidence in the record but from general information developed by the court independently of the litigation process. *Cf. United States v. DiPina,* 178 F.3d 68, 73-78 (1st Cir. 1999); *United States v. Roberts,* 39 F.3d 10, 13 (1st Cir. 1994) (Each holding that findings of the process followed in state court and its effect are issues of fact to be determined on the basis of record facts).

Finally, the First Circuit's "compelling inference" that petitioner pleaded guilty to the facts "embodied" but not expressed in the non-generic complaints finds no footing in

the law. The Massachusetts courts have been disinclined to discover a factual basis for guilty pleas for which there is no record colloquy. *Commonwealth v. Duquette*, 438 N.E.2d 334, 339 (Mass. 1982). In fact, even if the "embodiment" fiction was fact, a guilty plea constitutes an admission only to the elements set out in the charging document, and does not constitute an implicit admission to extraneous facts recited there. *United States v. Thomas*, 355 F.3d 1191, 1996 (9th Cir. 2004); *see also, United States v. Broce*, 488 U.S. 563, 569 (1989) (a defendant who pleads guilty admits "all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence").

The unavoidable fact remains that the burglary of a building issue which is indispensable to the ACCA enhancement issue was evidently irrelevant in the state court. Petitioner could have been charged with generic burglary but was not. The state court record indicates indifference to the "building" element in state court, a fact which the federal prosecutor recognized in asking the District Court: "I mean, what if the lower court's determination was how do you plead to 266, 16, and there is no further determination because the state court's not looking at the same things we're looking at?" To the District Court, this was a serious concern. J.A. 29. In the end, the prosecutor failed to produce any evidence of actual admissions in the plea colloquy. J.A. 133 ("I have no indication of what the plea colloquy determined or what documents were cited at the plea colloquy.").

The First Circuit's imagined meeting of the minds in petitioner's state plea proceedings is contradicted by actual experience in the federal courts. Justice Scalia pointed out in his dissent in *United States v. Bousley*, 523 U.S. 614 (1998) (dissenting) that the factual implications of guilty plea admissions will depend upon the legal issues being addressed. A defendant's plea to "knowingly and intentionally us[ing] . . . firearms during and in relation to drug trafficking" meant mere possession of a firearm in the vicinity of the drug

offense before this Court's ruling in *Bailey v. United States*, 516 U.S. 137, 144 (1995), but connoted active employment of the firearm after that decision." A guilty plea to the former does not imply an admission of the latter: "the factual basis [of a plea] will not include a fact which, by hypothesis, the court and the parties think irrelevant." *Bousley*, 523 U.S. at 631 n.* (Scalia, J., dissenting).

The heart of the First Circuit's ruling is that petitioner should be sentenced as an armed career criminal because he actually committed at least three generic burglaries. Here, as the prosecutor conceded, the issue of whether petitioner had burglarized a building as opposed to some other enclosure was not "necessarily adjudicated" in his prior plea proceedings. *Taylor*, 495 U.S. at 602. Yet the First Circuit ignored the implications of this concession for the prosecutions ability to meet its burden and instead looked to petitioner to rebut the "compelling inference" that the incident reports were reliable evidence of admissions to generic burglary. Looking past the First Circuit's debunked "compelling inference" construct, it is clear that the heart of its holding is that petitioner should be sentenced as an armed career criminal because the federal court believes that he actually committed at least three generic burglaries. This is exactly the rationale rejected in *Taylor*. The First Circuit's transparent circumvention of *Taylor*'s holding should be rebuffed.

D. The First Circuit's Rule Creates The Problems That *Taylor* Seeks To Avoid.

Taylor clearly identified the problems it sought to avoid in rejecting a fact finding method of qualifying prior convictions as ACCA predicates. Allowing the government to "seek enhancement on the ground that [the defendant] actually committed generic burglary" would have required the Court to devise an efficient, fair and uniform method of making that determination. 495 U.S. at 600. The Court concluded that, where a jury trial produced the conviction, reference to the

charging document and jury instructions would provide the information needed to identify the elements of conviction and carry out the categorical analysis. But it made no parallel provision for guilty pleas because it rejected fact finding, and the records of guilty plea convictions do not reliably identify the elements of conviction. Standards for determining what evidence could be considered would have to be established. A fact finding method would suffer from the myriad problems associated with old, stale evidence. *Sherbondy*, 865 F.2d at 1008 & n.16. Questions concerning the scope of permissible defenses would have to be resolved. In guilty plea cases, the problem of abbreviated and incomplete factual records would present persistent problems. And the question of whether the defendant was entitled to a jury trial to determine whether he had actually committed generic burglary would have to be addressed. *Taylor*, 495 U.S. at 601.

Harris and its progeny, culminating in *Shepard IV*, provide conclusive proof that the Court's assessment of the shortcomings of the fact finding method was prophetic. After twelve years of incessant litigation, including six years of litigation in this case, all of these problems have presented themselves and none has been acceptably resolved.

For example, the First Circuit has held subsequent to its rulings in *Shepard* that it is fair and consistent with *Taylor* to rely on the untested hearsay statements in an old police report of initial investigation to find that a defendant committed a crime he was never charged with. In *United States v. Delgado*, 288 F.3d 49 (1st Cir. 2002) the court approved, as being within the district court's fact finding discretion, an ACCA enhancement finding that the defendant was guilty of generic burglary on the basis of a police report where the defendant had been charged with armed house invasion even though he pleaded guilty only to an unspecified and lesser

offense.[13] *Id.* at 53-54 & n.6. The Circuit's interpretations of *Taylor* have been so confusing as to prompt it to refer to "the murky world of *Taylor v. United States*." *Emile v. INS*, 244 F.3d 183, 185 (1st Cir. 2001).

The standard of admissible evidence appears to be anything in the state court file which purports to describe the defendant's underlying conduct, unless the defendant challenges it factually. That standard unfairly burdens defendants and utterly fails to even acknowledge the constitutional concerns that the *Taylor* court recognized as inherent in such fact-finding forays.

Shepard II directed the district court to try to reconstruct the plea proceedings to determine whether petitioner admitted generic burglary then and there. But *Shepard IV* rejudicated that approach and substituted a procedural construct which, when defendants respond with claims of a right to trial, will squarely present the question of whether the Sixth

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[13] Reluctantly concurring, Judge Selya said:

> In virtually all circumstances, newly-constituted panels within a circuit are bound by the holdings of prior panels (citations omitted). Given the force of this rule and its applicability here, I acknowledge that *United States v. Shepard*, 231 F.3d 56, 66 (1st Cir. 2000), dictates the outcome of this appeal. I write separately, however, because I believe that Shepard, and cases like it, take impermissible liberties with the narrow exception envisioned in *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143 (1990), 109 L. Ed. 2d 607, and, thus, undermine the integrity of the categorical approach favored by the Supreme Court for cases in which predicate offenses are used to enhance defendant's sentences. Were we writing on a pristine page, I would hold particularized inquiry of the type and kind approved in the majority opinion inquiry (which ranges well past the charging papers, jury instructions, and other formal accouterments of the predicate offense to a copy of a police report compiled by an investigating officer) to be beyond the limits contemplated by the *Taylor* Court. The page, however, is not pristine, and so I reluctantly concur in the judgment of the panel.

Delgado, 288 F.3d at 57.

Amendment requires a jury trial and the beyond a reasonable doubt standard of proof.

II. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE REQUIRES THAT THE ACCA BE INTERPRETED TO PROHIBIT JUDICIAL FACT FINDING.

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones*, 526 U.S. at 239 (citations omitted). This Court's opinion in *Taylor* rests in part on this very doctrine of constitutional avoidance. Although the *Taylor* Court did not identify the doctrine by name, the Court articulated among the reasons for its holding the implications for a defendant's right to a jury trial if § 924(e)(2)(B)(ii) was interpreted to permit a "factual approach." 495 U.S. at 601. Thus, the Court held that the only plausible interpretation of § 924(e)(2)(B) is that it requires the sentencing court "to look only to the fact of conviction and to the statutory definition of the prior offense." *Id.* at 602. In applying the doctrine of constitutional avoidance to interpret the ACCA as prohibiting findings of fact that operate to enhance a sentence significantly, the *Taylor* Court presaged the Court's later opinions in *Jones*, 526 U.S. at 239, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

In *Jones*, for example, the Court construed a federal criminal statute to avoid Fifth and Sixth Amendment constitutional issues stemming from judge-made findings of fact that enhanced penalties beyond the statutory maximum. While both *Jones* and *Apprendi* note that "the fact of prior conviction" is excepted from prohibited factual findings, the justification for that exception is inapplicable here. The fact of a prior conviction is exempted from Fifth and Sixth Amendment procedural safeguards because they were in place during the course of those convictions. Here, however,

the factual inquiry goes beyond the fact of conviction to establish the underlying conduct and the events occurring at plea proceedings. Under the First Circuit's test, prior convictions may be reconfigured as a violent crime and therefore ACCA-qualifying felonies solely on the basis of the sentencing court's factual inquiry into what the defendant did and therefore "really" pled to. As noted in *Taylor*, such inquiry raises grave and doubtful constitutional questions, questions that have now been resolved by *Jones*, *Apprendi*, and *Blakely* in a way that supports petitioner's construction of *Taylor*.

A. Constitutional Avoidance in the Sentencing Context.

The precise constitutional problem to be avoided here is strikingly similar to the problem which influenced the Court's interpretation of the "carjacking statute" (18 U.S.C. § 2119) in *Jones v. United States*, 526 U.S. 227 (1999). That statute was interpreted as defining three different crimes rather than a single crime with two aggravating factors to be determined by the sentencing judge on a preponderance of the evidence. *Id.* at 251-52. There is no question here that § 924(e) elevates the penalty parameters as severely or even more severely than those at issue in *Jones*. Like Jones, the issue here is whether the sentencing court may consider facts not adjudicated in the prior proceeding in order to impose sentence for the "aggravated" version of the crime. The constitutional principle discerned in *Jones* was "under . . . the jury trial guarantees of the Sixth Amendment, 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." *Id.* at 243 n.6. In 1999, this principle had only been suggested by prior cases, but is now clearly established. *Apprendi*, 530 U.S. at 490; *Ring v. Arizona*, 536 U.S. 584, 603-09 (2002); *Blakely*, 124 S. Ct. at 2537. Thus the Court's level of constitutional concern here should rise above the level of doubt to near certainty.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000) the Court held that "Other than the fact of a prior conviction, 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." *Id.* at 490.

In both *Apprendi* and *Ring*, this Court concluded that the defendant's Sixth Amendment rights had been violated because the sentencing judge had "imposed a sentence greater that the maximum he could have imposed under state law without the challenged factual finding." *Blakely*, 124 S. Ct. at 2537. Similarly, in *Blakely*, the defendant's sentence was increased beyond the statutory maximum on the basis of findings of fact (that he had acted with "deliberate cruelty") by the sentencing judge that "were neither admitted by petitioner (in his guilty plea) nor found by a jury." *Id*. The Court held that *Blakely's* right to jury trial was violated because the judge acquired the authority to impose an enhanced sentence "only upon finding some additional fact." *Id*. at 2538.

As *Apprendi* specifies, the fact of a prior conviction is an exception to this rule. This is because the certainty that the defendant received due process in the proceedings leading to the conviction ameliorates the concern that taking judicial notice of the fact of conviction violates a defendant's right to due process in a recidivist sentencing forum. 530 U.S. at 487-88. "The rationale for exempting the fact of prior conviction from jury trial guarantees is that, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249.

However, the confidence that the *Jones* Court had in the integrity of prior convictions is misplaced in situations where, as here, a subsequent court must engage in fact-finding to resolve an ambiguity about the nature of the prior

conviction.[14] Here, the application of § 924(e) turns on a post hoc adjudication which was not conducted in accordance with these guarantees. Burglary of a building was not charged in the complaints to satisfy fair notice requirements. JA 52; J.A.III. 5, 8, 15, 21. It was not established beyond a reasonable doubt nor admitted in the guilty pleas, either as a fact or as an element. J.A. 24, 26, 28-30.

A plain reading of the opinion in *Taylor* interdicts these constitutional concerns. Limiting *Taylor*'s reach to the fact of conviction as determined by categorical approach cabins § 924(e) within the confines of the *Apprendi-Blakely* exception. *United States v. Cooper*, 2004 U.S. App. LEXIS 14685, at **29 n.3 (10th Cir. 2004); *United States v. Sanders*, 2004 U.S. App. LEXIS 15368, at *5 n.3 (8th Cir. 2004). *Taylor*'s categorical approach addresses and answers only questions of law (*e.g.*, whether the elements of the prior conviction encompass the elements of generic burglary) and so does not infringe on the right to have the jury assess all the facts which alter the congressionally proscribed range of penalties to which a criminal defendant is exposed. *Jones*, 526 U.S. at 253 (Scalia, J., concurring).

B. The First Circuit's Interpretation of the ACCA Raises Grave and Doubtful Constitutional Questions.

The approach adopted by the First Circuit permits and, as in this case would *require* the sentencing court to find facts beyond those adjudicated in the prior guilty plea in order to determine whether that plea was for generic burglary. These facts are not limited to the fact of conviction. The opinion in *Shepard IV* requires the sentencing court to receive and evaluate extrinsic evidence to assess the defendant's

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[14] As noted in Justice Thomas' separate concurrence in *Apprendi*, even fact-finding limited to prior conviction may itself raise the same grave and doubtful constitutional questions as fact-finding in relation to other enhancements. *Apprendi*, 530 U.S. at 519-21.

underlying criminal conduct. 348 F.3d at 314; J.A. 181-82. If that evidence indicates, for example, that the facts indicate that a defendant may actually have committed a generic burglary then the defendant must adduce persuasive evidence to the contrary. In the absence of such evidence and "[i]n the absence of other evidence of peculiar circumstances," *id.*, the court must infer that he pleaded guilty to generic burglary. *Shepard IV*, 348 F.3d at 314, J.A. 182. The guilty plea to a violation of 18 U.S.C. § 922(g)(1) authorizes a maximum of ten years imprisonment; a finding that the defendant qualifies as an armed career criminal requires a minimum sentence of fifteen years; there is no statutory maximum except that prescribed by the Sentencing Guidelines.

Avoiding this kind of "mini-trial" was one of the reasons for *Taylor*'s explicit rejection of a fact finding approach and the Court's embrace of a categorical approach that turns on legal questions alone. Indeed, the *Taylor* Court approved the Fifth Circuit's holding in *Vidaure*, 861 F.2d at 1340, that the ACCA determination of whether a crime was a "violent felony" involved only an issue of law because it did not involve judicial assessment of extrinsic evidence. *Id.* The Court's later decision in *United States v. Gaudin*, 515 U.S. 506 (1995) reinforces the need to maintain this boundary. In *Gaudin*, the Court reiterated that deciding issues of fact as well as mixed issues of law and fact is a function constitutionally allocated to the jury. *Id.* at 513-15. *Taylor*'s categorical approach is therefore entirely divorced from questions that properly fall within the province of the jury.

Petitioner did not contest the fact of his prior convictions. Following First Circuit precedent, the District Court received extrinsic evidence (the police reports and complaint applications) and made findings of fact attempting to reconstruct the state court guilty plea proceedings.[15] *Shepard*

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[15] Under the First Circuit's own test, the District Court's finding that the incident reports and other evidence were not a part of the plea

III, 181 F. Supp. 2d at 23-24, J.A. 158-62. However, considering extrinsic evidence, the First Circuit made extensive findings of fact of its own regarding the underlying conduct and the plea proceedings, as well as findings concerning Massachusetts state court procedures. It relied heavily upon its own assessment that petitioner had both actually committed generic burglary and admitted the facts of generic burglary in his guilty pleas to conclude that petitioner had been convicted of at least three prior generic burglaries. *Shepard IV*, 348 F.3d at 311, 313-14, J.A. 182. Indisputably, the court went far beyond the fact of conviction in obedience to its interpretation of *Taylor* and the ACCA.

Grave and doubtful questions arise not just from the fact-finding objectives of the First Circuit's inquiry, but also from the First Circuit's application of a preponderance standard. In both *Shepard II* and *IV*, the First Circuit approached its own test in a manner befitting civil, rather than criminal proceedings. For example, in *Shepard II*, the Court posited that it would be petitioner's obligation to raise "plausible objections" to the incident reports and if the prosecution did not make sufficient response, "the [sentencing] court may decide that it cannot conclude by a preponderance of the evidence that [petitioner's] pleas of guilty constituted admissions to unlawful entries into buildings." *Shepard II*, 231 F.3d at 69, J.A. 89. In *Shepard IV*, the First Circuit faulted petitioner for failing "to explain any circumstance surrounding the pleas that might defeat the natural inference that the pleas were to the crimes specified in the case files." *Shepard IV*, 348 F.3d at 314, J.A. 181-82.

The First Circuit's resort to the preponderance standard, and, further, to burden-shifting devices under that standard

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proceedings cannot have been erroneous, much less clearly so. The prosecution presented no evidence to connect those documents to the plea proceedings. The First Circuit was only able to make that connection itself through an inappropriated and erroneous presumption regarding Massachusetts state court procedure.

regarding Massachusetts state court procedure, are squarely in conflict with *Jones*, *Apprendi* and *Blakely*. In each of those cases, the Court has not only prohibited judicial fact-finding in usurpation of the jury's role, but has also upheld the defendant's due process right to a determination that beyond sentence enhancing facts existed beyond a reasonable doubt. Under a beyond the reasonable doubt standard, petitioner bears no burden and the prosecution bears a heavy one. The First Circuit's repeated criticism of petitioner for failing to present persuasive evidence that his pleas were not to generic crimes (*see Shepard IV*, 348 F.3d at 314, J.A. 181-82) is the antithesis of a proper due process analysis.

To avoid the "grave and doubtful" Fifth and Sixth Amendment issues squarely presented by the First Circuit's tests, this Court must reaffirm its holding in *Taylor*. *Taylor*'s categorical approach allows the sentencing court to do no more than compare the statutory elements of conviction or the adjudicated elements of conviction to the elements of generic burglary and conclude whether or not they "substantially correspond." It permits no fact finding nor consideration of extraneous evidence. With these restrictions, *Taylor*'s categorical approach involves only question of laws and avoids the grave and doubtful constitutional questions that the Court also avoided in *Jones* and the cases that followed it.

III. THE RULE OF LENITY REQUIRES THAT *TAYLOR*'S MODIFICATION FOR NONGENERIC STATUTES OF CONVICTION BE LIMITED TO JURY TRIAL CONVICTIONS.

Ambiguity concerning the scope of criminal statutes should be resolved in favor of lenity. *See United States v. Bass*, 404 U.S. 336, 347 (1971). Moreover, it is equally well settled that this rule applies not only to "the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Albernaz v. United States*, 450 U.S. 333, 343 (1981). Petitioner's position is that there is no ambiguity with respect to the scope and nature of the Massachusetts state statutes that underlie his

prior convictions: those statutes are non-generic. Consequently, there is no uncertainty regarding the nature of his plea of guilty to violations of those statutes: he did not plead guilty to violent felonies as defined under the ACCA and construed by *Taylor*. The First Circuit, however, in *Shepard II* and *IV* and their antecedents, devised a method to determine whether convictions under statutes that included more than just generic elements were nonetheless convictions for generic burglaries and thus, violent crimes pursuant to the ACCA.

The First Circuit's rulings run afoul of the rule of lenity from the outset. Justice Scalia's separate concurrence in *Taylor* noted that a review of legislative history to determine whether that history displays a more extensive punitive intent than indicated by the statute would only be undone by application of the rule of lenity. 495 U.S. at 603 (Scalia, J. concurring). Similarly, the First Circuit's command that sentencing courts review the record in order to determine whether a prior plea to a non-generic statute in fact could be interpreted as a violent felony was an unnecessary and inappropriate exercise. If the Massachusetts breaking and entering statutes and the resultant pleas thereto are somehow ambiguous as to whether they constitute generic crimes. Then the rule of lenity nonetheless require that they be interpreted as non-generic crimes and no further inquiry would be required.

Instead, the First Circuit's misreading of *Taylor* dramatically expands the scope of application of the ACCA enhancements. *Shepard IV*, 348 F.3d at 311, J.A. 177 (noting that *Taylor*'s categorical method "narrowed the Act dramatically"). As the First Circuit demonstrated in its rulings here, a step past the statute of conviction in assessing the nature of a prior plea is a step onto a slippery-slope of extensive fact-finding. Police reports, applications for complaints, plea proceedings, colloquies and even the intricacies of state court procedures all become fair game

examination and inference by the sentencing court. The First Circuit's exercise of stringing inference upon inference against the backdrop of a silent record is an anathema to the rule of lenity. Nor is the exercise even necessary in order to hold a defendant properly accountable for his criminal history. *Taylor*, 495 U.S. at 601 n.9, 602 n.10 (suggesting that, while the categorical method will not necessarily reach all generic burglary convictions, other sentencing enhancement provisions allow consideration of the defendant's conduct). *Taylor*'s categorical approach, by contrast, also is more likely to promote consistent, uniform application of the ACCA and eliminate reliance on subjective factors in making ACCA determinations. *Sherbondy*, 865 F.2d at 1009 n.17. In this case, the First Circuit has forced a claim of ambiguity. But to the extent that the underlying statutes are purportedly ambiguous with respect to the nature of the crimes they describe and therefore the resulting guilty pleas might be said to be ambiguous as well, the rule of lenity should be applied, and the Court should find that such convictions do not qualify as predicates for ACCA enhancement.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the First Circuit should be reversed, and the judgment of the United States District Court for the District of Massachusetts should be affirmed.

Respectfully submitted,

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