NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DESMOND TURNER

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Eleventh Circuit Court of Appeals erred in finding that the convictions for Burglary in the first degree under Alabama law qualified as a predicate offense under the Armed Career Criminal Act pursuant to *Mathis v. United States*, ___ U.S. ____, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016) and that imposing the Act caused him to receive an unreasonable sentence.

Whether this Court should grant the Petition for Certiorari and remand the case to the Eleventh Circuit Court of Appeals to revisit Turner's conviction and sentence in light of the Eleventh Circuit's opinion in *Ovalles v. United States* , 17-10172, released October 4, 2018, wherein it overturned its own case, *United States v. McGuire*, 706 F. 3d 1333(11th Cir. 2013), and followed the conduct based approach (as used in the Second Circuit) rather than the categorical approach involving 18 U.S.C 924(c) as it did in this case.

THE PARTIES

The caption in this case contains the name of all parties.

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REFERENCE TO OPINION DELIVERED BELOW

The Eleventh Circuit opinion dated July 10, 2018. (Appendix A)

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 10, Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

STATUTORY PROVISIONS INVOLVED

18 U.S.C § 922(g)(1)

18 U.S.C 924 (c)

Armed Career Criminal Act (18 U.S.C. 924(e))

STATEMENT OF CASE

Turner was indicted pursuant to 18 U.S.C § 922(g)(1) as a felon in possession of a firearm.(DOC. 01) He later pled guilty.(DOC.53)
Turner was sentenced to 240 months. (DOC. 40,55) Turner filed a timely appeal to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed Turner's conviction and sentence on July 10, 2018. (See, Appendix A)

STATEMENT OF THE FACTS

CHANGE OF PLEA- JANUARY 29, 2016

Turner was charged in a one count indictment with being a felon in possession of a firearm. (DOC.53-3) He changed his plea from guilty to not guilty on January 29, 2016. (DOC.53-23) The Court began to go over, with Turner, the five page document entitled Guilty Plea Advice of Rights Certification.(DOC.53 4-9)

The Court further advised Turner what the Government would have to prove to be found guilty. First, that he had been convicted of at least one felony previously. Second, the Government must prove that after that felony conviction he(Turner) was in possession of a firearm in this case a High Point nine millimeter semi-automatic pistol. Finally, the Government would have to prove that the firearm traveled in interstate commerce and was not manufactured in Alabama. (DOC.53-9) The Court further advised that the Government deemed that he possessed the firearm knowingly which meant voluntarily and intentionally not because of mistake or accident. The Court then clarified the definition for Turner

again to say that it was not necessary for possession purposes that Turner be the actual owner of the firearm but that he could possess it even if it belonged to someone else.(DOC.53- 10,11)

The Court then advised Turner that he was looking at a possible sentence of 10 years if the Armed Career Criminal Act did not apply. If it applied he would be looking at 15 years. Turner affirmed that he understood. That there was a potential monetary fine of not more than $250,000 and that a prison term would be followed by a period of supervised release. If the Armed Career Criminal Act did not apply supervised release would be no more than three years. If it applied the supervised release would be no more than five years and that Turner would be required to pay $100 special assessment. (DOC. 53- 11)

As part of the plea agreement the Government recommended that Turner be sentenced to a term of 20 years with his sentence to be run concurrently with any sentence imposed in his State case. The Court indicated that the Government's recommendations were not binding on the Court. (DOC. 53- 14)

The Government then outlined the terms of the plea agreement. The Court went over the plea agreement with Turner and the factual basis the Government would offer at trial. Turner acknowledged his signature and initials on each page of the plea agreement. (DOC.53- 11-17)

Turner acknowledged that he knew he was waving his right to appeal and to any post conviction relief and that there had been no promises made to him outside the plea agreement nor had anyone coerced or threatened him in anyway to encourage him to plead guilty. (DOC. 53-18- 20)

Turner understood that the 20 year recommendation was merely a recommendation by the Government and not a stipulated agreement. Turner acknowledged that he was pleading guilty because he was in fact guilty of the charge. (DOC. 53- 20, 21)

Turner understood that changing his plea to guilty that he would not be able to withdraw his guilty plea. The Court found that Turner was fully competent and capable of doing and informed plea and he was aware of the nature of the charges in consequences of the plea of guilty and that is the was knowing and voluntary supported by an independent basis in fact contained in each of the elements essential to the offense. The Court accepted the guilty plea and adjudicated the defendant guilty of Count One. (DOC. 53-23, 24)

SENTENCING -MARCH 2, 2017

The defense noted that it objected to the four level increase pursuant to U.S.S.G. 2K2 .1 B6B as overly punitive given that the drugs seized were possessed for personal use. The Court overruled the objection. (DOC.55- 2) Defense counsel states that she has previously objected to the Armed Career Offender Act (18 U.S.C. 924(e)) in her sentencing memo as well as in her opposition pleading regarding the Government's request for an upward departure. The Court then noted that starting at paragraph 22 of the probation officer had documented at least four predicate offenses necessary for application of the our career offender. (DOC.55- 3) These were three cases of attempted murder where Turner pled guilty on March 7, 2006. The Court acknowledged that they are to be treated as one predicate offense because they occurred at the same time and he

pled guilty to them at the same time. The second predicate offense is a burglary in the second degree, CC- 2005- 4336, Jefferson County, Alabama in which Turner pled guilty to on March 7, 2006. The third predicate offense was a burglary in the first-degree in DC- 2005-291,Shelby County, Alabama where Turner pled guilty on April 12, 2006. And finally the fourth predicate offense was a conviction for burglary in the first-degree in CC- 2006 – 240, Jefferson County, Alabama where Turner pled guilty on July 26, 2006. (DOC.55-4)

Defense counsel noted that at the time Turner pled guilty in those State cases he was serving time on a federal case. Turner's counsel at that time and the District Attorneys agreed that Turner would receive a split sentence and the State sentence would run concurrent with the federal sentence he was serving and would be a wash so to speak. In hindsight and facing what he is now Turner might not have pled guilty to those charges. (DOC. 55-5)

Defense counsel commented that a 20 split 5 sentence would not have been given if indeed the three attempted murders were really serious. Further, counsel argued that the burglary second-degree counts as one of the predicates under the ACCA, but noted that the statute on burglary second degree is a little more generic than the statute for burglary in the first-degree. Defense counsel argued that Turner's position was that the two burglary first degree cases should not count as predicates and relied on *Mathis v. United States*[1] which was released on April 26, 2016 by the United States Supreme Court. (DOC. 55-5,6) Counsel referred to

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[1]*Mathis v. United States*, ___ U.S. ____, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016)

the history of the *Shepherd*[2] case, the *Taylor*[3] and the *Descamps*[4] cases and those in between and noted that it was not until the *Johnson*[5] case was released by the United States Supreme Court that the Courts began to get some traction with regard to the predicates and how they should apply. (DOC.55- 6)

Defense counsel noted that in *Johnson, supra* that one could not use the Residual Clause to determine elements under the ACCA. Counsel noted that the United States Supreme Court has indicated that the Court should look at the elements of the offense not what happened. Counsel argued as was held in *Mathis* that the Alabama statute regarding the definition of burglary is broader than a generic definition of burglary. (DOC. 55-7,8)

A discussion regarding Alabama's burglary first statute and the *Mathis* case implications begins between the Court and defense counsel. (DOC. 55-7-11) Defense counsel respectfully disagreed with the Court because of counsel's understanding that they say you first got to knowingly and unlawfully enter and remain unlawfully in the dwelling with the intent to commit a crime in effecting entry, while in the dwelling or in the immediate flight therefrom, the person or another participant in the crime, number one, is armed with explosives or, number two, causes physical injury to any person who is not a participant in the crime, or,

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[2]*Shepard v. United States*, 544 U.S. 13 (2005)

[3]*Taylor v. United States,* 495 U.S. 575 (1990)

[4]*Descamps v. United States,* 570 U.S.____, 133 S.Ct. 2276,186 L.Ed. 2d 438,458 (2013)

[5]*Johnson v. United States,* 559 U.S. 133 (2010)

number three, in effecting entry is armed with a deadly weapon or dangerous weapon, or while in the dwelling or immediate flight therefrom the dwelling uses or threatens the immediate use of a deadly weapon or dangerous instrument against another person. Counsel's position was that this is broader, similar to the statute in Mathis case, is a broader definition of burglary than was states by the United States Supreme Court, a crime containing the following elements. (DOC. 55-10, 11)

The counsel for the Government noted its disagreement with defense counsel's position and argued that he did not see any problem with the Alabama statute as it related to burglary one. The Court noted that it felt that in every burglary one in Alabama that they would have to find at least those basic elements that the Supreme Court has said makeup burglary and the fact that Alabama adds additional elements like having begun hurting someone or anything else like that doesn't make it less of a crime of violence. The Court noted that the problem in the end that there could be an order that would take it outside the generic definition of burglary. (DOC. 55- 11, 12) The Court noted that if they had not said "and you also have to have one of these other things to be burglary in the first-degree" or if it had said "or you occupy a boat and you have dynamite with you" or something like that, then that would be the problematic situation. (DOC.55-12, 13)

Defense counsel continues to object and argue against the imposition of the ACCA using the analysis from the *Mathis* case. (DOC. 55-13-16,18) The Court then renders its interpretation of the meaning of *Mathis* and the Alabama statute on burglary first and overrules the objection. (DOC. 55-16,17)

Defense counsel objected to the application of the ACCA as a Sixth Amendment violation where the facts of conviction were not decided by a jury beyond a reasonable doubt. (DOC. 55- 18) Defense counsel objected to the Court's ruling as regards the ACCA. (DOC. 55- 19)

The Government introduces copies of Turner's convictions in his State cases. They are Exhibits 1-8 and are made a part of the record. (DOC.55-20-22)

The Court noted that all objections had been ruled on and made specific findings that the defendant had three qualifying felonies at least three actually more which are separate and distinct pursuant to 18 U.S.C. §924(E)(1). The Court noted that the guideline offense level was 31, the criminal history score five, and advisory guideline range of imprisonment was from 180 months to 210 months. The supervised release range was five years in the fine range was $15,000 to $150,000. The Court noted restitution was not issue. (DOC. 55- 22)

Defense counsel argued that the five extra years extra tacked onto the ACCA application was significant. With the criminal history score being 5 and the adjusted base offense level of 30 would result in a guideline range of 151 to 188 months. Counsel urged the Court to consider the least sentence possible in this particular case. (DOC. 55-30,31) The Government asked for an upward variance. The Court believed the 240 month sentence was appropriate. (DOC. 55- 39 -43) Defense counsel objected to the Court's imposition of the Armed Career Criminal Offender Act and the 20 year sentence as being unreasonable under the circumstances of the case. (DOC. 55-46)

REASONS FOR GRANTING THE PETITION

In *Mathis v. United States,* ___ U.S. ____, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016) the U.S. Supreme Court addressed a decision of the Eighth Circuit regarding its position on the Armed Career Criminal Act (ACCA), 18 U.S.C.§924(e).

The Court held that Mathis' prior convictions could not give rise to ACCA's enhancement because the elements of Iowa's burglary law are broader than those of generic burglary. The Court noted in no uncertain terms that a state crime cannot qualify as an ACCA predicate if its elements are broader than those listed for the generic offense. A sentencing Judge can look only to the elements of the offense not the facts.

As to burglary the Supreme Court meant "a crime containing the following elements: an unlawful or unprivileged entry into a building or other structure with intent to commit a crime".

In *Mathis v. United States, supra,* the court held:

"Our decisions have given three basic reasons for adhering to an elements-only inquiry. First, ACCA's text favors that approach. By enhancing the sentence of a defendant who has three "previous convictions" for generic burglary, §924(e)(1) – rather than one who has thrice committed that crime – Congress indicated that the sentencer should ask only about whether "the defendant had been convicted of crimes falling within certain categories," and not about what the defendant had actually done. *Taylor*, 495 U. S., at 600."

Second, a construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns. This Court has held that only a jury

and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000). That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. He can do no more consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.

And third, an elements-focus avoids unfairness to defendants. Statements of "non-elemental fact" in the records of prior convictions are prone to error precisely because their proof is unnecessary. *I.d.*, ____ at (slip op., at 15). At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law: to the contrary, he "may have good reason not to" – or even be precluded from doing so by the court. *Ibid.* When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. See *ibid.*[6] Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.

Those three reasons stay as strong as ever when a statute, instead of merely laying out a crime's elements, lists alternative means of fulfilling one (or more) of them. ACCA's use of the term "convictions" still supports an elements-based inquiry;

[6] To see the point most clearly, consider an example arising in the immigration context: A defendant charged under a statute that criminalizes "intentionally, knowingly, or recklessly" assaulting another – as exists in many States, see, *e.g.*, Tex. Penal Code Ann. §22.01 (a)(1) (West Cum. Supp. 2015) – has no apparent reason to dispute a prosecutor's statement that he committed the crime intentionally (as opposed to recklessly) if those mental states are interchangeable means of satisfying the single *mens rea* element. But such a statement, if treated as reliable, could make a huge difference in a deportation proceeding years in the future, because an intentional assault (unlike a reckless one) qualifies as a "crime involving moral turpitude," and so requires removal from the country. See *In re Gomez-Perez*, No. A200-958-511, p. 2 (BIA 2014).

indeed, that language directly refutes an approach that would treat as consequential a statute's reference to factual circumstances *not* essential to any conviction. Similarly, the Sixth Amendment problems associated with a court's exploration of means rather than elements do not abate in the face of a statute like Iowa's: Whether or not mentioned in a statute's text, alternative factual scenarios remain just that – and so remain off-limits to judges imposing ACCA enhancements.

In this case the probation officer relied on two burglary first degree convictions as a predicate for the suggested ACCA enhancements.

Alabama's Burglary First Degree Statute:

§ 13A-7-5. Burglary in the first degree.

(a) A person commits the crime of burglary in the first degree if he or she knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, and, if, in effecting entry or while in dwelling or in immediate flight therefrom, the person or another participant in the crime: (1) Is armed with explosives; or (2) Causes physical injury to any person who is not a participant in the crime; or (3) In effecting entry, is armed with a deadly weapon or dangerous instrument or, while in the dwelling or immediate flight from the dwelling, uses or threatens the immediate use of a deadly weapon or dangerous instrument against another person. The use of or threatened use of a deadly weapon or dangerous instrument does not include the mere acquisition of a deadly weapon or dangerous instrument during the burglary. (b) Burglary in the first degree is a Class A felony.

The definition in the Alabama statute is a broader definition than the generic burglary statute and lists alternative means of satisfying the crimes elements. It is for

this reason the ACCA should not apply as the burglary first convictions are not a predicated offense for an ACCA application.

It appears that the Eleventh Circuit has determined that in determining whether a predicate offense constitutes a crime of violence within the meaning of 924(c)(3)(B) should be determined using a conduct based approach (in following with the Second Circuit's reasoning) rather than a categorical approach as it did in my case. Thus overruling its own case *United States v. McGuire*, 706 F. 3d 1333(11th Cir. 2013),(See page 48 of *Ovalles* opinion). Thus resulting in a possible split in the Circuit Courts of Appeal.

CONCLUSION

It is for all the reasons noted above that this Court should grant the Petition for Writ of Certiorari vacate the decision of the Eleventh Circuit Court of Appeals and remand the case in order to revisit its decision in this case in light of its opinion in *Ovalles.*

Submitted on October 8, 2018.

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