

No. 18-

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IN THE  
**SUPREME COURT  
OF THE UNITED STATES**

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REGINALD L. LOMAX, Jr.,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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December 12, 2018

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## **QUESTION PRESENTED**

The question presented in this case is whether, as the circuit court held, a state statute criminalizing possession of “counterfeit” controlled substances – which are not proscribed as “controlled substances” by federal drug laws – nevertheless qualifies as a “serious drug offense” under the Armed Career Criminal Act, 18 U.S.C. § 924(e), such that a defendant previously convicted under such a statute is subject to the fifteen-year mandatory minimum term of imprisonment imposed by the Act.

## **PARTIES TO THE PROCEEDINGS**

The petitioner herein, who was the defendant-appellant below, is Reginald L. Lomax, Jr.

The respondent herein, which was the appellee below, is the United States of America.

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## **PETITION FOR A WRIT OF CERTIORARI**

The petitioner, whose judgment of conviction and sentence was affirmed by the court of appeals in this case, hereby petitions this Court for a writ of certiorari to review the final order of the U.S. Court of Appeals for the Third Circuit.

### **OPINIONS BELOW**

The opinion of the court of appeals is unpublished but reproduced in the appendix to this petition. Petition Appendix (“Pet. App.”) 1a. The opinion and order of the district court is unpublished but is reproduced in the appendix. Pet. App. 16a.

### **JURISDICTION**

The order sought to be reviewed was entered by the court of appeals on August 10, 2018. Pet. App. 1a. A petition for rehearing was timely filed on August 23, 2018, and denied on September 14, 2018. Pet. App. 26a. This Court has jurisdiction over this timely filed petition pursuant to 28 U.S.C. § 1254(1).

### **STATUTORY PROVISIONS**

The relevant statutory provisions, 18 U.S.C. § 924(e), and 35 Pa. Cons. Stat. §§ 780-113(a), 780-115, are reproduced in the appendix to this petition. Pet. App. 27a.

### **INTRODUCTION**

The circuit court in this case held that a state statute criminalizing possession of “counterfeit” controlled substances – which are not proscribed as “controlled substances” by federal drug laws – nevertheless qualifies as a “serious drug offense” under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and that a defendant previously convicted under such a statute is subject to the fifteen-year mandatory

minimum term of imprisonment imposed by the Act. App. 1a-8a. That ruling, as Judge Thomas L. Ambro recognized in his dissenting opinion, conflicts with “decades of Supreme Court precedent,” including *Taylor v. United States*, 495 U.S. 575 (1990), which holds that under the categorical approach a state crime may be deemed a “serious drug offense” only if the elements of the state statute correspond to those of federal drug laws. App. 9a-15a. A writ of certiorari should be granted to resolve this conflict, to avoid a split among the circuits, and to address an issue of exceptional importance.

### STATEMENT OF THE CASE

The relevant background of this case is simple, and undisputed. The defendant, Reginald L. Lomax, Jr., was charged with unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g), and pled guilty to the offense. App. 1a-8a. The maximum term of imprisonment for that offense would normally be 10 years, *see* 18 U.S.C. § 924(a)(2), with a much lesser sentence often recommended under the U.S. Sentencing Guidelines, *see* U.S.S.G. § 2K2.1 (2016). In this case, however, the government argued that Mr. Lomax was subject to a maximum term of life imprisonment – and a mandatory minimum sentence of fifteen years – under the Armed Career Criminal Act, which provides for such an enhanced sentence if a defendant has been previously convicted of three or more “serious drug offenses,” defined as any state crime “involving manufacturing, distributing, or possessing ... a controlled substance ... for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e).

One of the offenses cited by the government was a 2006 conviction in Pennsylvania for possession with intent to distribute marijuana. That offense, under 35 Pa. Cons. Stat. § 780-113, carries a maximum term of imprisonment of five years – and thus could not itself qualify as a “serious drug offense” under the Act, *see* 18 U.S.C. § 924(e) – but another Pennsylvania statute, 35 Pa. Cons. Stat. § 780-115, calls for a maximum term of ten years if the defendant was previously convicted of any state crime involving possession or distribution of either a controlled substance or a “counterfeit” controlled substance. Because Mr. Lomax had at least one prior Pennsylvania conviction of such a crime, the government argued that the maximum term of imprisonment was ten years under 35 Pa. Cons. Stat. § 780-115, and that the 2006 conviction therefore constituted a “serious drug offense” under the Act. *See App. 16a-20a.*

Defense counsel argued to the contrary that, because the Pennsylvania statute penalizes a broader range of conduct than federal drug laws, the state crime could not be deemed a “serious drug offense.” *App. 16a-20a.* That position followed precedent from this Court and others, including *Taylor v. United States*, 495 U.S. 575 (1990), which held that, under the “categorical approach,” a state crime can be deemed a “serious drug offense” for purposes of the Armed Career Criminal Act only if the elements of the state statute are no broader than those of federal law. *App. 16a-20a.* Because the elements of the Pennsylvania recidivism statute, 35 Pa. Cons. Stat. § 780-115, could be satisfied by a prior conviction of possession of a “counterfeit” controlled substance, which would not constitute a crime under federal drug laws,

Mr. Lomax's 2006 conviction did not constitute a "serious drug offense," and could not support an enhanced sentence under the Act. App. 16a-20a.

The district court nevertheless imposed the enhanced sentence. It acknowledged that the recidivism statute, 35 Pa. Cons. Stat. § 780-115, could not qualify as a "serious drug offense," since it punishes conduct not covered by the federal drug laws, but it deemed the point irrelevant. App. 16a-20a. It reasoned that, since the 2006 conviction had been predicated upon possession with intent to distribute marijuana, in violation of 35 Pa. Cons. Stat. § 780-113, only that statute should be considered in assessing whether the crime constituted a "serious drug offense," even though the statutory maximum term was increased to ten years only because the recidivism statute was also applied. App. 16a-20a. On that basis, the district court held that the 2006 conviction qualified as a "serious drug offense," and that Mr. Lomax was subject to the fifteen-year mandatory minimum sentence. *Id.*

Two members of the circuit court voted to affirm that judgment. The majority opinion concluded, as had the district court, that the 2006 conviction qualified as a "serious drug offense" – even though the recidivist statute on which it was based, 35 Pa. Cons. Stat. § 780-115, penalized conduct not covered by federal drug laws – because the conviction had been predicated upon possession with intent to distribute marijuana, under 35 Pa. Cons. Stat. § 780-113, which would also be punishable under federal law. App. 1a-8a. Responding to defense counsel's arguments regarding *Taylor*, it held that neither that opinion nor the categorical approach had "no connection" to the question presented. *Id.*

The third member of the panel, Judge Ambro, dissented in a separate opinion. His opinion explained that *Taylor* and other decisions require application of the categorical approach, without exception. App. 9a-15a. Because Mr. Lomax had been convicted under 35 Pa. Cons. Stat. § 780-115, which (as the majority acknowledged) penalized conduct not encompassed by federal law, including possession of a “counterfeit” substance, the 2006 conviction could not be deemed a “serious drug offense.” App. 9a-15a. The opinion noted that, if the only statute to be considered was 35 Pa. Cons. Stat. § 780-113 – as the majority had done – then the maximum term of imprisonment would be five years, meaning the offense could not qualify as a “serious drug offense” even under the majority’s rationale. App. 9a-15a.

### **REASONS FOR GRANTING THE PETITION**

The decision of the Third Circuit – holding that a prior conviction under a state recidivism statute qualifies as a “serious drug offense” under the Armed Career Criminal Act even though that statute penalizes conduct not covered by federal drug laws – conflicts with binding precedent of this Court, as well as opinions from other circuits, *infra* Part I, and represents an issue of exceptional importance not only to the defendant in this case but to innumerable other individuals who may be charged on the same basis under the Act, *infra* Part II. A writ of certiorari should be granted.

#### **I. THE DECISION OF THE THIRD CIRCUIT, HOLDING THAT THE ARMED CAREER CRIMINAL ACT APPLIES, CONFLICTS WITH OPINIONS OF THE U.S. SUPREME COURT AND OTHER CIRCUITS.**

The decision of the Third Circuit is – as Judge Ambro stated in his dissenting opinion – flatly contrary to governing precedent of this Court, most notably *Taylor v.*

*United States*, 495 U.S. 575 (1990). *Taylor* held unequivocally that, in assessing whether a prior state conviction qualifies as a predicate offense under the Armed Career Criminal Act, courts must apply the “categorical approach,” which is satisfied only if the elements of the state offense are no broader than the elements of the corresponding federal crime. 495 U.S. at 600. This Court has, after *Taylor*, repeatedly and consistently employed the categorical approach in all cases under the Act; in no case has the Court ever held, or even suggested, that the approach should not be applied in addressing these issues. *See, e.g., Mathis v. United States*, 136 S. Ct. 2243, 2248-51 (2016). To the contrary, it has emphasized “in no uncertain terms” that the categorical approach is the appropriate mode of analysis under the Act, and that “a state crime *cannot* qualify as [a] predicate [offense] if its elements are broader than those of [the federal] offense.” *Id.* (emphasis added).

Numerous cases from other circuits have recognized this point. They have stated, in case after case, that the categorical approach is mandated by *Taylor*, rejecting arguments that subsequent decisions created “any exception” to it. *United States v. Buie*, 547 F.3d 401, 405 (2d Cir. 2008); *see also, e.g., United States v. White*, 837 F.3d 1225, 1229 (11th Cir. 2016). These have included cases, like this one, in which the prior conviction at issue involved a state recidivism statute. *E.g., United States v. Kearney*, 675 F.3d 571, 576-78 (6th Cir. 2012). Never before has any other circuit suggested that there exists a general exception to the categorical approach in this or any other class of cases.

The decision of the Third Circuit does exactly that, however. It holds that the categorical approach does not apply – in fact, has “no connection” at all – to the issue of whether a prior conviction under a state recidivism statute constitutes a “serious drug offense” under the Armed Career Criminal Act, and it concludes on that basis that a prior conviction under Pennsylvania’s recidivism statute qualifies as such an offense, even though that statute concededly penalizes conduct not covered by federal drug laws. App. 1a-8a. The majority opinion does not disagree that the categorical approach would dictate a different result, as Judge Ambro explained in dissent (App. 9a-15a), but it simply refuses to apply that approach to the recidivism statute. See App. 1a-8a. To quote from Judge Ambro’s opinion, the majority’s holding “has no basis in ... decades of Supreme Court precedent.” App 9a-15a.

The majority reasoned that its departure from *Taylor* and the categorical approach was justified by *United States v. Rodriguez*, 553 U.S. 377 (2008). App 1a-8a. At issue in *Rodriguez* was whether, in determining if the “maximum term of imprisonment prescribed by law” for a prior conviction exceeds ten years for purposes of the Armed Career Criminal Act, courts should consider only the sentence prescribed by the state statute defining the base offense, or whether they should consider also any additional or enhanced sentence available under recidivism statutes. 553 U.S. at 382-87. This Court held that recidivism statutes must also be considered, meaning that an offense which would alone normally carry a sentence of less than ten years, and thus would not meet the minimum threshold for a predicate offense under the Act, could nonetheless qualify if a recidivism provision increased

the maximum sentence to ten years or more. *Id.* In so ruling, the Court noted that *Taylor* had addressed an entirely distinct question – *i.e.*, the analytical approach for determining whether a state conviction meets the definition of “serious drug offense” or “violent felony” under the Act – and that *Taylor*’s rationale therefore had “no connection” to the issue under review, which concerned the interpretation of the phrase “maximum term of imprisonment prescribed by law.” *Id.*

Thus, while the opinion in *Rodriquez* certainly says that *Taylor* had “no connection” to the particular question presented in that case (language on which the panel majority seized, App. 1a-8a), it “did nothing to jettison the categorical approach” (in Judge Ambro’s words, App. 9a-15a) or to limit its application. Quite the opposite, *Rodriquez* recognizes explicitly that the categorical approach should continue to be employed in addressing whether a state conviction qualifies as a “serious drug offense” or “violent felony” under the Act. 553 U.S. at 382-87. Indeed, in holding that recidivism statutes must be considered when addressing the nature of a prior conviction, *Rodriquez* confirms that those statutes must also be assessed under the categorical approach, whenever they form a basis for the prior conviction and sentence. *Id.* In short, nothing in *Rodriquez* states or even suggests that it was meant to overrule *Taylor sub silentio*, or create an exception to the categorical approach for any class of cases, including those dealing with recidivism provisions.

The Third Circuit’s decision, refusing to apply the categorical approach to recidivism provisions, hence represents a misinterpretation of *Rodriquez*, an abrogation of *Taylor*, and a rejection of a long line of Supreme Court precedent. At

the very least, it reflects a novel and unprecedented extension of *Rodriguez*, which – in light of the conflicts created with *Taylor* and other decisions – warrants consideration by this Court.

## **II. THE APPLICABILITY OF THE ARMED CAREER CRIMINAL ACT REPRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE.**

Review would be warranted in any event, given the exceptional importance of the issue presented. The Armed Career Criminal Act provides for an extraordinary increase in the applicable range of imprisonment – requiring a mandatory minimum term of fifteen years, and raising the maximum term from ten years to life – and it applies whenever a defendant, convicted of a single federal firearms offense, has three or more prior convictions for a state crime that qualifies as a “serious drug offense” or “violent felony.” 18 U.S.C. § 924(e). Determining whether a prior conviction constitutes such an offense under the Act is, therefore, a matter of critical import in every firearms case.

That is particularly true when the prior convictions at issue are under Pennsylvania drug laws. Tens of thousands of criminal cases under those laws were opened or pending in 2016 alone,<sup>1</sup> and the defendants in those cases could be subject to sentence under the Pennsylvania recidivism statute – with a maximum term of imprisonment of ten years – if they were previously convicted even once of any similar crime. 35 Pa. Cons. Stat. § 780-115. Any and all of those convictions would, under

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<sup>1</sup> See Admin. Office of Pa. Cts., Criminal Caseload Data: Common Pleas Court, *at* <http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/statewide-criminal-dashboard-common-pleas-court> (last visited Aug. 13, 2018).

the Third Circuit’s ruling, qualify as predicate offenses under the Armed Career Criminal Act.

That ruling thus exposes any or all of those thousands of individuals, if they are ever convicted of even one federal firearms offense (including, as here, for mere unlawful possession), to the massive sentencing enhancement prescribed by the Act, including the fifteen-year mandatory minimum term of imprisonment. The enhancement could be based on past crimes that are not violent or particularly serious, but on offenses that are classified under state law as misdemeanors (such as possession of marijuana) and that would not even constitute crimes under federal drug laws (such as distribution of “counterfeit” controlled substances). Given the sheer number of individuals convicted every year under Pennsylvania drug laws, and the ever-increasing number of firearms prosecutions in the federal system,<sup>2</sup> such cases (of which this is one) will continue to arise with even greater frequency, exposing more and more relatively minor offenders to draconian sentences of fifteen years’ imprisonment or more.

Few statutes in the federal system call for a mandatory minimum sentence, and fewer still call for a mandatory term anywhere near as high as fifteen years.<sup>3</sup> Those statutes are intended to cover only the most extreme offenses and the most

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<sup>2</sup> See U.S. Sentencing Comm., Statistical Information Packet: Fiscal Year 2017, *at* <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2017/3c17.pdf> (last visited Aug. 13, 2018).

<sup>3</sup> See U.S. Sentencing Comm., Mandatory Minimum Penalties in the Federal Criminal Justice System, *at* [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\\_Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf) (last visited Aug. 13, 2018).

dangerous offenders, for which standard punishment provisions were deemed by Congress to be facially insufficient, and they should be construed with that intent in mind, and not employed unless their applicability is beyond question. *See, e.g., Alleyne v. United States*, 133 S. Ct. 2151, 2154-59 (2013); *see also* Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 2.2(d), at 110 (1986). That cannot be said in this case, or in other cases involving the Armed Career Criminal Act and Pennsylvania's recidivism statute. The issue merits review.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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