No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JONATHAN JOUETTE – PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

RESPECTFULLY PRESENTED,

By _____

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QUESTIONS PRESENTED

Whether application of the rule pronounced in *Taylor v. United States*, 495 U.S. 575, 598, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), barring the sentencing court from considering materials other than the charging instrument in determining a defendant's qualification for enhanced sentencing under 18 USC 924(e), the Armed Career Criminal Act, when charged with being a felon in possession of a firearm in violation of 18 USC 922(g)(1), results in violation of the petitioner's substantive and procedural rights guaranteed by the United States Constitution, Fifth and Fourteenth Amendments, as applied to petitioner.

Whether the evidence supported a finding that the petitioner's convictions for burglary of a pharmacy and distribution of narcotics were sufficiently separated by time and space to be considered two separate convictions, as required to be qualifying convictions for purposes of imposing an enhanced sentence under 18 USC 924(e), the Armed Career Criminal Act.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITIED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[x] reported at 722 Fed.Appx. 360 (US 5th Circuit, May 11, 2018), 2018 WL 2186502; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was May 11, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____ , and a copy of the order denying rehearing appears at Appendix .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(Text of these provisions are contained in Appendix D to this Petition)

18 USC 922(g)(1)

18 USC 924(e)

United States Constitution, Amendment 5

United States Constitution, Amendment 14

STATEMENT OF THE CASE

On or about December 15, 2012, Jonathan Jouette and an unknown accomplice stole pharmaceuticals out of a delivery trailer in the parking lot of a pharmacy. They waited until the driver had left the vehicle, making his delivery inside the pharmacy, before they cut off the padlock on the trailer, grabbed random crates of pharmaceuticals, and fled before the driver returned. (PSR Addendum/Objection to PSR No. 3, ROA. 174-175) In April, 2014, the defendant pled guilty to burglary of a pharmacy and distribution of a Schedule II controlled dangerous substance in the 23rd Judicial District, represented by Andre Belanger, a Baton Rouge criminal defense attorney. (PSR Addendum/Objection to PSR No. 4, ROA. 179) The plea was what is known in Louisiana's state criminal courts as a "non-responsive" plea,[1] where a plea to a charge having little or nothing to do with the offense conduct is taken, to achieve a particular goal of the defendant and state prosecutors working together. In this case, it was to have Mr. Jouette's incarceration for the theft of drugs to run concurrent with his probation violation, and to guarantee restitution to the truck driver. The Boykin Form/Plea Agreement prepared by the District Attorney's Office in this case identifies the offense as "simple burglary of a vehicle"[2] (ECF Doc. 34, Transcript of Sentencing, ROA. 102-103, Defense Exhibit 1, ROA. 126-131)

On or about January 9, 2016, Jonathan Jouette and Clayton James were riding around Baton Rouge in a truck they had purchased for $300.00. In the back seat was a rifle, purchased by Mr. Jouette from an old girlfriend, and an unidentified female passenger. The vehicle, which had been

[1] See *State v. Jackson*, 04–2863 (La.11/29/05); 916 So.2d 1015

[2] Louisiana Revised Statutes, Title 14, Section 62, Simple Burglary, which would provide in relevant part "A. Simple burglary is the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60." Louisiana Revised Statutes, Title 14, Section 60, Aggravated Burglary, would not be applicable to the facts as set forth herein.

stolen earlier that morning by other parties, was spotted by the owner at a gas station. The owner approached the vehicle and confronted the occupants of the vehicle, who fled the scene. East Baton Rouge Sheriff's deputies were contacted and gave chase, leading to the vehicle being abandoned in a wooded lot in the northern part of East Baton Rouge Parish, where the vehicle was recovered. (PSR, ROA. 152-153)

When the Sheriff's Department searched the vehicle, they found a rifle, a Russian SKS, magazines, ammunition, a cigarette wrapper with white powder in it which was tentatively identified as methamphetamine, and a thumbprint belonging to Jonathan Jouette. Mr. Jouette was questioned at the Ascension Parish jail in April, 2016, by DEA task force agents, where he admitted possession of the rifle, and denied possession or knowledge of any drugs in the vehicle. At about the same time, the task force agents attempted to question Clayton James, who declined to answer any questions, and was not charged for his part in this incident. (PSR, ROA. 152-153)

Based on the confession and other evidence gathered, petitioner Jonathan E. Jouette was indicted on February 2, 2017, in a two-count indictment, alleging that he was a felon in posession of a firearm in violation of 18 USC 922(g)(1), and that he possessed methamphetamine with intent to distribute, in violation of 21 USC 841, all on or about January 9, 2016. (ECF Doc. 1, ROA. 8-11) Mr. Jouette pled not guilty on February 27, 2017 (ECF Doc. 10, Record at Page 25)

The Louisiana State Police Crime Lab tested the alleged drugs, and found that it was in fact DMSO, an inert substance used as a liniment, or to dilute pure drugs to extend the weight (i.e. "to cut" the drugs). Upon determining that there were no actual drugs in the vehicle, and no representations to third parties that the DMSO was, in fact, real narcotics, the United States dismissed the drug charge against Mr. Jouette. (ECF Doc. 34, Transcript of Sentencing, ROA.109-111)

Based on the confession, which was videotaped, including audio recording, Mr. Jouette pled guilty to a single count of being a felon in possession of a firearm, without a plea agreement. The guilty plea was taken on April 20, 2017. The Court advised Mr. Jouette of the maximum sentence for an ordinary felon in possession charge under 18 USC 922(g)(1), and also of the sentencing enhancement and higher possible sentence provided by 18 USC 924(e), the "Armed Career Criminal Act." (ECF Doc. 33, Transcript of rearraignment, ROA. 71-72, 80-83)

The presentence report was released on July 4, 2017. The Presentence Report suggested that the enhanced penalties of the Armed Career Criminal Act were appropriate in this case. (PSR, ROA. 149 and 155) The defense objected to the presentence report, and the addendum was released on August 9, 2017. (PSR Addendum, ROA. 172-182) Sentencing Memoranda were filed, under seal, by the United States and the defense, prior to sentencing. (ROA 199, 209)

Sentencing was held on August 31, 2017. The Court granted several objections to the presentence report, which were offered by way of clarification of the defendant's character and history. (ECF Doc. 34, Transcript of Sentencing, ROA. 94-99) The defense offered, filed, and introduced the "Boykin Form/Plea Agreement" from the 23rd Judicial District Court in Ascension Parish, Louisiana, and proffered a police report, which was accepted as a proffer, rather than an exhibit of which the Court could take formal notice. (ECF Doc. 34, Transcript of Sentencing, ROA. 100-102) The District Court reluctantly denied the objection to the imposition of the Armed Career Criminal Act, and imposed a fifteen year sentence, in accordance with 18 USC 924(e). (ECF Doc. 34, Transcript of Sentencing, ROA. 106-107, 118-122) Defendant offered an oral notice of appeal in open court, which the District Court noted, and filed a written notice of appeal on September 1, 2017. (ECF Doc. 34, Transcript of Sentencing, ROA. 122-123, ECF Doc. 28, Notice of Appeal, ROA. 54-55)

REASONS FOR GRANTING THE PETITION

This case presents a fact pattern in which the enhanced penalties of the Armed Career Criminal Act are being imposed on a defendant who clearly does not deserve the enhanced penalty, as acknowledged by the District Court. The categorical evaluation of prior convictions, mandated by *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), prevented the District Court from acknowledging facts which were not in dispute, that the "burglary" committed by Mr. Jouette, was not a burglary, or was at worst, burglary of a vehicle, and further that it was, in fact, a crime designed and executed to avoid confrontation or danger.

The District Court, and the defendant, felt the application of this rule was unfair, as to this defendant. As District Judge Brian A. Jackson explained:

> I've got to tell you, Mr. Scott, this is one of those instances, sadly, where essentially my hands are tied as a District Court. The Supreme Court has been clear about when District Courts can look beyond or behind the conviction, the facts leading to the charges, and it is pretty clear in the *Taylor* case and in other cases that the Court must consider solely the conviction and the statute to which the defendant was found guilty and not to the facts.
>
> Now, that's – it's a harsh reality, and it's a – some would say, I think, a harsh application of the law. And sometimes, as we all know, that kind of a harsh application of the law results in sentences that might in some cases, as in this case, be disproportionate to the crime. The irony, of course, is that we are here to do justice, and that is what we strive to do every day. Having said that, our hands nonetheless are tied.
>
> (Transcript of Sentencing, ROA 106, Lines 5-22)
>
> What I'm suggesting to you, sir, is that having learned about you, about your crimes, even about some of the victims of your crimes, I nonetheless conclude that a 15-year sentence is simply not warranted in your case, despite your extensive criminal history. But unfortunately that doesn't count because I am required to abide by, again, the provisions of the Armed Career Criminal Act which require at least a 15-year sentence in your case.
>
> (Transcript of Sentencing, ROA 115, Lines 2-11)

The Armed Career Criminal Act has taken a substantial portion of this Court's docket, since 1990, with no less than sixteen major substantive cases through 2016, and three more set for argument in October of 2018.[3] The "categorical approach" to evaluating prior convictions was discussed in *Johnson v. U.S.* 135 S.Ct. 2551 (2015), and explained the need for simplicity:

> *Taylor* explained that the relevant part of the Armed Career Criminal Act "refers to 'a person who ... has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction. For example, if the original conviction rested on a guilty plea, no record of the underlying facts may be available. "[T]he only plausible interpretation" of the law, therefore, requires use of the categorical approach.
>
> (*Johnson*, supra, at 2562, internal citations omitted)

Of course, as with most problems relating to the Armed Career Criminal Act, it could not be as simple as a plain categorical approach to evaluation of qualifying prior convictions, as shown in *Shepard v. U.S.*, 544 US 13, 125 S.Ct. 1254 (2005). The "modified categorical approach," approved in *Shepard*, was devised to address a prior conviction for statutes which had varying elements for conviction, some of which would qualify as Armed Career Criminal Act predicate offenses, but others not. Again, the Court had to devise new terminology, in this case, the "divisible" statutory model, which would permit the courts to look to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of. From there, armed with the elements, the sentencing court could go back to the "categorical approach," for comparison with the relevant

[3] *U.S. v. Sims*, Docket No. 17-766, *U.S. v. Stitt*, Docket No. 17-765 (linked with Sims), and *Stokeling v. US*, Docket No. 17-5554.

"generic offense." The "generic offense" of burglary has been held to mean a crime "contain[ing] the following elements: an unlawful or unprivileged entry into ... a building or other structure, with intent to commit a crime."[4]

Mathis v. U.S., 136 S.Ct. 2243 (2016), presented a different type of alternatively worded statute—one that defined only one crime, with one set of elements, but which listed alternative factual means by which a defendant can satisfy those elements. Where the sentencing court finds that different facts, rather than different elements of the offense, are determinative, and those facts are broader than "generic burglary," the conviction would not qualify for the Armed Career Criminal Act.

In 2012, pertinent the statutory language of Burglary of a Pharmacy, Louisiana Revised Statutes, Title 14, Section 62.1[5] read:

> A. Simple burglary of a pharmacy is the unauthorized entry of any building, warehouse, physician's office, hospital, pharmaceutical house, or other structure used in whole or in part for the sale, storage and/or dispensing of controlled dangerous substances, as defined in R.S. 40:961(7), with the intent to commit the theft of any drug which is defined as a controlled dangerous substance in R.S. 40:961(7) other than set forth in R.S. 14:60.

Thus it appears that although Burglary of a Pharmacy is not a generic burglary, the elements include (1) unauthorized entry into (2) a building or other structure, (3) with the intent to commit a crime therein, that being, the theft of controlled dangerous substances. It appears indivisible, and necessarily, addressed by the categorical approach of *Taylor*, which is what the District Court did.

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[4] *Taylor*, supra, at 598

[5] La. R.S. 14:62.1, Simple Burglary of a Pharmacy, was repealed in the 2017 legislative session as part of a consolidation and revamping of Louisiana's numerous subcategories of burglary and theft. See Act 281, 2017 Regular Legislative Session.

Understanding that certiorari is rarely granted based on the proper application of existing laws, petitioner respectfully suggests that the result of the categorical approach to evaluating prior convictions for Armed Career Criminal Act enhancement has produced a manifest injustice in this case. The defendant's plea to Burglary of a Pharmacy was not responsive to the facts underlying the case, and was confected to serve the needs of the defendant and his victim, and as such, was a "legal fiction."

Some exception might be crafted by this Court for a defendant in this position, who would be permitted to show reliable documentation of facts which would bring the prior conviction out of the reach of the Armed Career Criminal Act, without disrupting the "categorical approach" and "modified categorical approach." At sentencing, the defense offered, filed, and introduced the "Boykin Form/Plea Agreement" from the 23rd Judicial District Court in Ascension Parish, and proffered a police report, which was accepted as a proffer, rather than an exhibit of which the Court could take formal notice. (ECF Doc. 34, Transcript of Sentencing, ROA. 100-102) Under the "modified categorical approach," the "Boykin Form/Plea Agreement" would appear to fall within the reliable category of court documents which the sentencing court may use to determine a fact at issue, and in this case, it would show confusion between the charging instrument and the Boykin document. Although the elements of Burglary of a Pharmacy are correctly recited, the factual basis states "Johnathan (sic) Jouette did commit simple burglary of a pharmaceutical utility trailer belonging to Hackbarath Delivery Services,"[6] which is clearly not generic burglary as defined by *Taylor*. If the police report, which was proffered, and not in dispute, could be used in part to

[6] Defense Exhibit 1, ROA 128-129

establish how to offense in question was committed, for purposes of demonstrating that the guilty plea, which on its face is a qualifying Armed Career Criminal Act predicate, was not in fact the crime of conviction, it would be even clearer.[7]

In the alternative, the Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment likewise provides ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law." A plain categorical approach would indicate that Burglary of a Pharmacy is a qualifying Armed Career Criminal Act predicate offense, but the record is internally inconsistent – the charge of conviction qualifies as a predicate, but the Court's factual basis, proposed by the prosecution, does not. The limitation on the sentencing court, by the "categorical approach," has deprived the petitioner of a substantial liberty interest, without due process of law. The rule imposed, by *Taylor*, serves to enhance his sentence without allowing him to be heard on the facts underlying the enhancement, which if heard, would not qualify him for the enhanced sentence.

The "Boykin Form/Plea Agreement," meant to satisfy the requirements of *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), is inconsistent. The defendant's waiver of the privilege against self-incrimination shows him confessing to a crime that is not the crime of conviction. If the Court does not want to tamper with the "categorical approach," it might find that the plea was improperly taken, as the factual basis was improper, and that the trial judge in 2012, ought not to have accepted the plea as presented.

[7] Defense Proffer Exhibit, ROA at 135, for the factual description of the theft.

Finally, if the "modified categorical approach" were permitted, it would show that the "Boykin Form/Plea Agreement" shows both offenses being committed "on or about December 15, 2011."[8] 18 USC 924(e)(1) states clearly:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen 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).
>
> (emphasis added)

Under applicable Fifth Circuit law, the critical inquiry when deciding whether separate offenses occurred on "occasions different from one another" for purposes of the ACCA is whether the offenses occurred sequentially. *United States v. Ressler*, 54 F.3d 257, 260 (5th Cir.1995). To determine whether two offenses occurred on different occasions, a court is permitted to examine only "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *United States v. Norwood*, 155 Fed.Appx. 784, 785–86 (5th Cir.2005) (quoting *Shepard v. United States*, 544 U.S. 13, 16, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)). Accordingly, if the facts of the offense are not viewed, for purposes of Armed Career Criminal Act enhancements, except through a limited range of documents, which does not include the Presentence Report, but which does include the written plea agreement, then the District Court's finding that the two offenses were committed on occasions different from one another was error, and merits remand for resentencing under the ordinary provisions of 18 USC 922.

[8] Defense Exhibit 1, ROA at 129

CONCLUSION

The petitioner has accepted responsibility for his criminal acts, by confession to law enforcement and his guilty plea. This Court's requirement of the "categorical approach," in this case, tied the hands of the District Court, which acknowledged that petitioner was not the class of defendants that the Armed Career Criminal Act is designed to punish. This Court is the only source of relief for petitioner, who prays that his petition for a writ of certiorari be granted.

RESPECTFULLY PRESENTED,

By _____

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PROOF OF SERVICE

I, Joseph K. Scott, III, do swear or declare that on this date, August 2, 2018, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

Brandon Fremin, United States Attorney for the Middle District of Louisiana, 777 Florida Street, Suite 222, Baton Rouge, LA 70801

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 3, 2018.

_____

Joseph K. Scott, III