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IN THE SUPREME COURT OF THE UNITED STATES

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REGINALD SHEPARD, :

Petitioner :

v. : No. 03-9168

UNITED STATES. :

- - - - -X

Washington, D.C.

Monday, November 8, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

LINDA J. THOMPSON, ESQ., Springfield, Massachusetts; on behalf of the Petitioner.

JOHN P. ELWOOD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:59 a.m.)

3 JUSTICE STEVENS: We will hear argument in
4 Shepard against the United States.

5 Ms. Thompson.

6 ORAL ARGUMENT OF LINDA J. THOMPSON

7 ON BEHALF OF THE PETITIONER

8 MS. THOMPSON: Justice Stevens, and may it
9 please the Court:

10 This case involves the proper application of the
11 categorical method of analysis that this Court prescribed
12 in Taylor against United States, and it involves the
13 application of that categorical method to what is
14 described as ambiguous burglary convictions obtained under
15 nongeneric burglary statutes with boiler plate complaints
16 and a general finding of guilty following a plea
17 proceeding.

18 At stake --

19 JUSTICE SCALIA: What -- what do you mean by a
20 -- just so we get our terms defined, what do you mean by a
21 nongeneric burglary statute --

22 MS. THOMPSON: In this case --

23 JUSTICE SCALIA: -- and a generic burglary
24 statute?

25 MS. THOMPSON: Well, a generic burglary statute,

1 as -- as defined in the Taylor case is one that
2 criminalizes unlawful entry into a building or a structure
3 with intent to commit another crime. Those are the three
4 elements of generic burglary. Those apply if any -- if a
5 State statute covers those three, it's considered generic
6 burglary and would then qualify as a predicate violent
7 felony under the Armed Career Criminal Act.

8 A nongeneric --

9 JUSTICE O'CONNOR: Now, do you -- do you agree
10 that all the papers showing the arrest and the
11 investigation and so forth show that this was in fact a
12 building --

13 MS. THOMPSON: No.

14 JUSTICE O'CONNOR: -- that was burglarized?

15 MS. THOMPSON: I do not. I -- as this --

16 JUSTICE O'CONNOR: Does it show it was a
17 vehicle?

18 MS. THOMPSON: It doesn't show that it was a
19 vehicle.

20 JUSTICE O'CONNOR: Or a boat?

21 MS. THOMPSON: It doesn't show that it was a
22 boat.

23 JUSTICE O'CONNOR: Or a motorcycle?

24 MS. THOMPSON: It doesn't show that it was a
25 motorcycle.

1 JUSTICE O'CONNOR: It shows nothing? None of
2 the supporting documentation shows what it was?

3 MS. THOMPSON: Those supporting documents do not
4 play a role in the adjudication.

5 JUSTICE O'CONNOR: Well, that isn't my question.
6 I asked you whether any of them show that it was, in fact,
7 a building or a car or a boat.

8 MS. THOMPSON: None of them shows that it was
9 anything other than a building.

10 JUSTICE O'CONNOR: Thank you.

11 MS. THOMPSON: The police reports and the
12 complaint applications, but the statute --

13 JUSTICE GINSBURG: Well, why -- why are you
14 resisting that the -- that the police report gave an
15 identified building? I mean, you're -- you're saying that
16 one mustn't look behind, in the case of a guilty plea, to
17 find the police report or even the police application for
18 complaint. But there isn't any question, is there, that
19 the police reports in fact gave addresses of particular
20 buildings?

21 MS. THOMPSON: There is no question of that.
22 When you look at the police reports, if you read those
23 police reports, some of which you can actually read, they
24 do describe buildings and they describe addresses and
25 hallways and things like that.

1 JUSTICE GINSBURG: So what -- what you're saying
2 is the conviction itself didn't show that, and so the
3 question is whether you can look to documents that in fact
4 showed it.

5 MS. THOMPSON: That's -- that's correct, Justice
6 Ginsburg.

7 JUSTICE O'CONNOR: So the rule you would have us
8 follow does result in a -- a super technicality in a sense
9 of what -- what was on the record at the time of the plea.

10 MS. THOMPSON: Well, actually the district court
11 established that this was not on the record at the time of
12 the plea. The district court took evidence on this issue.
13 The statutes to -- that are underlying these convictions,
14 to get back to Justice Scalia's question, are nongeneric,
15 and they are nongeneric in the sense that they make it
16 unlawful to break into structures other than buildings or
17 in addition to buildings.

18 JUSTICE KENNEDY: Suppose -- suppose in the
19 earlier conviction, the police report is in the court.
20 It's not part of the record, and then the court says, I've
21 read the police report. Is that accurate? And the client
22 -- or the defendant says, yes. Then later, can we go back
23 and look at the police report even though it was not
24 annexed as part of the record?

25 MS. THOMPSON: Well, that calls into question

1 what kinds of documents can be examined in terms of making
2 a -- a determination as to whether this offense was
3 categorically a crime of violence, that is, that it was
4 generic burglary. It's our position that there's a
5 limitation, and the limitation is imposed by Taylor
6 itself, that the question being answered be made a
7 question of law, that it is a question of law, that it's a
8 matter of law that you make the determination.

9 JUSTICE GINSBURG: But if the defendant at the
10 plea colloquy had said, yes, I entered X building or even
11 in the plea bargain had said that, even though the charge
12 just read the boiler plate, the whole statute, buildings,
13 vessels, et cetera, if he had admitted it either in the
14 plea colloquy or in the plea bargain, wouldn't that be
15 enough?

16 MS. THOMPSON: If we had a contemporaneous
17 record of the adjudication of this conviction that showed
18 an actual admission to breaking into a building, I believe
19 that that would satisfy a sort of modified Taylor
20 categorical approach.

21 JUSTICE BREYER: I -- I don't understand your
22 reading of Taylor. As I've read that case many times, it
23 seemed to me that that was making a perfectly sensible
24 point. At the end of the opinion, Justice Blackmun says,
25 you know, there are some States like Massachusetts, for

1 example, that instead of just saying burglary, they say
2 burglary of a -- of a ship or a car or a building. And
3 that leads us to answer a more general question. Well, in
4 context, that more general question is whether you ought
5 to go look into how a particular burglary was committed to
6 see if there was really violence or not. And he says no.
7 Just look to the definition of the crime. That's what he
8 says. That will end it.

9 Now, he says we agree, because I started here,
10 that we have a couple of States with some weird statutes,
11 and what you have to do in those States is you won't know
12 if it's a boat or a car or -- so he says, for example, in
13 a State like the one we have, if it shows it's charged us
14 with a burglary and you have to find out, you know, here's
15 what you do. It says you may have to go beyond the mere
16 fact of conviction. So he says go look to the indictment
17 or information and jury instructions. That isn't a
18 limiting phrase. That's for example. He just thought
19 that in those cases, that's what -- all you'll have to
20 look to, for example.

21 We happen to have an unusual case where there
22 are no jury instructions because he pled guilty. So
23 what's the harm of going looking to the documents that
24 will show, in an uncontested way, just what the address on
25 these pieces of paper show? There are no boats, you know,

1 in Watertown. It's not a dock, I don't think, or at least
2 not in that part of it. So -- so I mean, what's the
3 problem here?

4 MS. THOMPSON: Well, the --

5 JUSTICE BREYER: Why is everyone so mixed up? I
6 must be missing something.

7 MS. THOMPSON: The example that's given, the
8 charging document and jury instructions -- let's suppose
9 that instead of -- of guilty pleas, Mr. Shepard was tried
10 and he was tried on this nongeneric, boiler plate
11 complaint, and there were no jury instructions available.

12 JUSTICE BREYER: What's the problem? I grant
13 you I could imagine a case that could be a problem. Maybe
14 it was a houseboat. Okay?

15 (Laughter.)

16 JUSTICE BREYER: Or maybe it's like a trailer.
17 So if we run into that case, we'll deal with it. You
18 know, I'm perfectly capable of thinking that if this is a
19 charge where there is a dispute on the contested point,
20 fine, we won't take that dispute into account, maybe
21 decide it in the favor of the defendant, maybe. But this
22 is not that case.

23 And by the way, if he's going to say, how do you
24 know? I'd say, I know. I know Boston and I also know
25 that breaking into a boat at least is unusual. So if he

1 thinks it wasn't that, let him say so.

2 MS. THOMPSON: The district court did actually
3 entertain this issue, Justice Breyer, and what they --
4 what the district court found was there wasn't an
5 opportunity, there wasn't a reason for Mr. Shepard to
6 contest building or any other element of this offense.

7 JUSTICE BREYER: No, of course, there wasn't.
8 So all he has to do now is say, Judge, in my latest thing,
9 you know, they say 30 Bremer Street. 30 Bremer Street
10 sounds like the address of a building, but by the way,
11 unusually enough, it's the license plate of a car.

12 Now, if in fact that's the case, he can come in
13 and say it. There's no Fifth Amendment problem. We're
14 talking about sentencing and what a prior conviction was.
15 He doesn't even have to say it. You as his lawyer could
16 tell us.

17 Now, you know why I think you don't say it?
18 Because it isn't conceivably right.

19 MS. THOMPSON: Well, and it also isn't in fact.
20 And the question here is --

21 JUSTICE BREYER: What do you mean it isn't right
22 in fact? What is it?

23 MS. THOMPSON: Is it in law --

24 JUSTICE BREYER: Yes.

25 MS. THOMPSON: -- or in fact that we are trying

1 to make this determination?

2 JUSTICE BREYER: We look to facts about what the
3 prior convictions were about. That's what Taylor says.
4 That, of course, is a fact, but it's a legal fact, what
5 was this conviction for.

6 MS. THOMPSON: Taylor said you don't look at
7 facts --

8 JUSTICE BREYER: I understand your reading of
9 it. What I want to know is what's wrong with my reading
10 of it.

11 MS. THOMPSON: Because your reading of it
12 requires a look at the underlying conduct. It actually
13 requires. And the document here that was selected to
14 exhibit the underlying conduct is as far away as you can
15 get from an adjudicatory document.

16 JUSTICE SOUTER: All right. What -- is -- is
17 your argument that we are likely, in effect, to -- to
18 violate some constitutional standard if we do what the
19 Government wants, or is your argument as follows? That
20 Taylor says this is an offense-based not a fact-based
21 determination. Taylor says that's what the statute is
22 getting at. And if you go as far as the Government wants
23 here, you basically will have gone beyond offense-based.
24 You will have gone -- become fact-based and you will be
25 violating the statute.

1 So my question is, is there something
2 constitutionally we have to worry about which is the basis
3 for your argument, or is it a violation of the statute
4 that you think we ought to be worried about?

5 MS. THOMPSON: In this case it's the statute
6 that was violated, but you are correct, Justice Souter --

7 JUSTICE SOUTER: Well, I don't have a position.
8 I can't --

9 MS. THOMPSON: -- that -- no. You are correct
10 in representing that the Government's approach to this
11 will take what is quintessentially a question of law, that
12 is, a comparison of adjudicated elements of -- adjudicated
13 elements of conviction against -- compared to the elements
14 of generic burglary. That's a question of law. Do they
15 match? Do they not match?

16 It becomes a question of fact then, as the First
17 Circuit put it in Shepard and in the Harris case, to
18 determine what was actually in the mind of the defendant
19 at the time he entered his plea.

20 JUSTICE SOUTER: Well, aren't we asking that
21 question in -- in any case? The question ultimately is,
22 what did he mean when he said I am guilty? If you've got
23 a plea colloquy, as you admitted a moment ago, it's easy
24 to find out what he meant because they would have gone
25 into the factual basis for the plea. If there's a written

1 plea agreement, it's probably going to be easy to find out
2 because, again, there would be a basis for the plea set
3 out.

4 Here, there isn't one of those documents. So
5 you're going one step further, but you're still asking the
6 question what did he mean when he stood in that courtroom
7 and said I am guilty. And yes, in -- in one sense that's
8 fact-based, but all of those questions are fact-based.
9 They're going to the same issue. What did he mean? What
10 was pleading guilty to? Isn't that correct?

11 MS. THOMPSON: Well, because it's based on an
12 examination of the underlying conduct, which is forbidden
13 by the Taylor decision --

14 JUSTICE O'CONNOR: Well, maybe, maybe not.
15 That's kind of the question we have, how -- what gloss to
16 put on Taylor.

17 JUSTICE KENNEDY: Suppose --

18 JUSTICE O'CONNOR: Do you join the amici in
19 saying Almendarez-Torres has to be overruled?

20 MS. THOMPSON: No, I do not.

21 JUSTICE O'CONNOR: No.

22 MS. THOMPSON: I do not join --

23 JUSTICE KENNEDY: But suppose --

24 JUSTICE O'CONNOR: All right. So we're
25 looking --

1 JUSTICE KENNEDY: -- Taylor were not on the
2 books. What -- what would be the basis of your argument?
3 You say that it's all right to look at a plea colloquy,
4 but it's not all right to look at an arrest report to
5 which the judge referred. What's the basis for that
6 distinction? What sense does it make?

7 MS. THOMPSON: The sense it makes it this. What
8 the Armed Career Criminal Act addresses and what this
9 Court discussed in Taylor was the applicable term is
10 conviction, that is, a conviction for a categorical
11 offense. The categorical offense is a crime of violence
12 specifically described as burglary, arson, but there are
13 specifically described crimes. Those are things that you
14 can determine as a matter of law. Do the elements match
15 the -- the generically violent crime, or do they not match
16 the generically violent crime? If they do not match the
17 generically violent crime, you might still be able to
18 figure out, you might be able to surmise what the
19 defendant actually had in his mind, if he had anything in
20 his mind, about this at the time of the guilty plea.

21 Well, one of the unique things about the --
22 these nongeneric burglary statutes in Massachusetts is
23 that they're really relatively petty offenses.

24 JUSTICE KENNEDY: But -- but why can you look at
25 what's in the plea colloquy that's in the record, but you

1 cannot look at a document that the judge referred to, if
2 that document isn't there? What's -- what's the common
3 sense argument that you're making? I -- I don't
4 understand it.

5 MS. THOMPSON: Well, there is no evidence in
6 this case that the judge referred to a police report.

7 JUSTICE KENNEDY: No. This is my little
8 hypothetical case so that we can test your theory, just to
9 see the reasons that you're advancing for -- for us to
10 rule in your favor. And I -- I don't see any rationale
11 that you've given us.

12 MS. THOMPSON: If you can look at the colloquy
13 and the judge, without incorporating it, has the defendant
14 explicitly admit the facts that constitute the elements of
15 generic burglary, it is our position that that -- that
16 conviction could be used to enhance. But --

17 JUSTICE BREYER: Let me try the same question.

18 JUSTICE KENNEDY: But -- but why can't you go
19 one step further and refer to the document that was not in
20 the record but that the judge mentioned in his -- in his
21 findings at the first sentencing? Why? I still haven't
22 had a reason why.

23 MS. THOMPSON: I agree that whether or not that
24 document is in the record, if there is an explicit finding
25 or an admission by the court that enters the judgment,

1 that the defendant broke and entered a building, that that
2 conviction should be able to qualify as a predicate under
3 the Armed Career Criminal Act. It is not a requirement
4 that the underlying document be incorporated into the
5 record, only that the admission be made or the facts be
6 found by the fact-finder, whoever is taking the plea.

7 JUSTICE STEVENS: May I ask you a question?
8 Assume the case had been tried and you could not tell from
9 either the indictment or the instructions to the jury
10 whether it was a generic burglary or a nongeneric
11 burglary. Would the -- our decision permit us to look at
12 the transcript of the trial to answer that question?

13 MS. THOMPSON: Certainly not under Taylor. The
14 whole idea of Taylor was partly dictated by the words of
15 the statute.

16 JUSTICE STEVENS: So your argument is that this
17 is comparable to using the transcript of the trial.

18 MS. THOMPSON: This is -- it -- well, I don't
19 think it's comparable because the district court finding
20 was that the documents that the Government relies on were
21 not involved in the adjudication at all. So it --

22 JUSTICE STEVENS: So this is even farther
23 removed.

24 MS. THOMPSON: This is even farther removed than
25 a plea colloquy, farther removed than a trial transcript

1 looking into the evidence --

2 JUSTICE BREYER: But that's what I don't
3 understand. We're now talking about that part of Taylor
4 which deals with a narrow statute where our object is not
5 to find out what he's guilty of or anything. We're just
6 trying to find out what was the crime he was charged with.
7 And there are two or three States which lump together in
8 one statute crimes that are violent and nonviolent.
9 Burglary of a structure is violent. Burglary of a car or
10 a ship is not. So all we want to know is what was the
11 charge at issue.

12 Now, do you -- let me break the question into
13 two parts. The key sentence here, I think, is for
14 example, in a State whose burglary statutes include entry
15 of an automobile, as well as a building, if the indictment
16 or information and jury instructions show that the
17 defendant was charged only with burglary of a building,
18 then it's going to be violent.

19 Now, would you -- would you agree with me or not
20 that he could have written -- Justice Blackmun -- that
21 same sentence to say if, for example, the indictment or
22 information and jury instructions show? Would you be
23 willing to add those two words, for example?

24 MS. THOMPSON: If, for example.

25 JUSTICE BREYER: If, for example. I want to

1 know how -- how absolute you're making this. If, for
2 example.

3 And the next question I'd ask would be if you
4 agree for example, what are the things you can look to and
5 what are the things you can't?

6 MS. THOMPSON: And I -- I do agree that that's
7 one of the questions presented by this case.

8 JUSTICE BREYER: Yes, but do you want add the
9 for example or do you want to take it just categorically?

10 MS. THOMPSON: Well, I do believe that the best
11 reading is the categorical reading.

12 JUSTICE BREYER: Yes.

13 MS. THOMPSON: But I'm willing to accept for
14 example --

15 JUSTICE BREYER: Okay. Then what kinds of
16 things would you --

17 MS. THOMPSON: -- for purposes of argument.

18 JUSTICE GINSBURG: -- let us look to and what
19 kinds of things not? All we're interested in is what was
20 he charged with, which of these three things.

21 MS. THOMPSON: And all Taylor and the Armed
22 Career Criminal Act are interested in is what was he
23 convicted of.

24 JUSTICE BREYER: No, no, no. I will get that
25 later. Let me deal with the charge. If he was charged

1 with breaking into a boat, that's the end of this. Okay?

2 MS. THOMPSON: True.

3 JUSTICE BREYER: So, fine. So I want to know
4 what he was charged with. Let me do that one.

5 Now, what will you let me look to to see what he
6 was charged with?

7 MS. THOMPSON: You can look to the charging
8 document and the statute to see what he was charged with.

9 JUSTICE BREYER: All right. So what happens in
10 the case where -- Justice Blackmun let us go further than
11 that. He says the indictment -- that's the charging
12 document -- or information and jury instruction. He'll
13 let us look to a jury instruction as if there's actually
14 been a trial. So he'll let us go further than you will.

15 MS. THOMPSON: Not to determine what he was
16 charged with. To determine what he was convicted of.
17 Because the jury instructions are not going to be
18 factually oriented. The jury instructions are going to
19 tell you what the element of the crime was, elements that
20 were adjudicated. So that if you have the person charged
21 with a nongeneric document here -- the nongeneric statute,
22 a boat, a house, a whatever, and the jury instructions
23 establish for you that he could not have been convicted by
24 that jury without finding a house because that's the
25 elements laid out in the jury instruction --

1 JUSTICE BREYER: And what's the difference
2 between that and a police report that makes it quite clear
3 that in the circumstances there was no possibility of a
4 boat or a car being involved? What's the difference
5 between that and the police report?

6 MS. THOMPSON: The police report does not show
7 you what the results of the adjudication was. It does not
8 establish --

9 JUSTICE BREYER: No. What shows us that -- what
10 shows us that is --

11 MS. THOMPSON: The elements.

12 JUSTICE BREYER: -- is the check mark. No. The
13 check mark on the form that says, for example, plea, admit
14 sufficient facts. You know, that's a check mark or it's
15 on the form. It says plea, guilty. I mean, you know, you
16 could have different things checked. So that's what
17 established the guilt.

18 And then the police report establishes whether
19 -- what kind of a thing was at issue. And I will agree
20 with you that if it's at all contested, we shouldn't get
21 into it. But if it's not contested, there's no question.
22 There was no boat around there. It's a city street. Or
23 there was no car. It's plain it was a building. Then
24 that's just as good as the jury instruction. Why not?
25 Tell me why not.

1 MS. THOMPSON: Well, I suggest that it doesn't
2 tell you anything about what's actually been adjudicated.
3 What it tells you, it's what's actually been charged.

4 And here's one of the things that came up in the
5 district court in front of Judge Gertner, and the
6 Government brought up this as well as Judge -- as the
7 district court judge. What if Mr. Shepard went in and
8 said, yes, I broke into the property of another person
9 with intent to commit a crime? That would be a factual
10 basis that would be adequate for the -- for any sentence
11 that could be imposed under that statute. Because the --
12 because of the fact that the boat, the house, the car, and
13 the vessel are all put on the same level, the operative
14 fact is is it yours, Mr. Shepard. Does that belong to
15 you, Mr. Shepard?

16 JUSTICE BREYER: I mean, but that's always true.
17 You could have a -- you could have a -- a sheet that
18 shows: admitted, assault, you know. And -- and what the
19 sheet says, it says: charge, assault; plea, guilty. It's
20 possible, for all we know, that when the actual colloquy
21 took place, he was talking about some other thing. I
22 don't know what he was talking about, but what you'd go
23 upon is that there was a charge and he pleaded guilty to
24 the charge.

25 MS. THOMPSON: Which brings me to Henderson

1 against Morgan. One of the issues in Henderson against
2 Morgan is whether or not you can infer guilt of an element
3 that is not specifically charged even from overwhelming
4 evidence, that that could be proved.

5 JUSTICE BREYER: I -- I don't -- good. Are you
6 going to explain this? Because I thought what we were
7 supposed to do is just look to the sheet, charge; the
8 plea, guilty. And that is what we do and it disposes of
9 98 percent of the cases.

10 MS. THOMPSON: It does.

11 JUSTICE BREYER: All right. So -- so are you
12 talking about those 98 percent now?

13 MS. THOMPSON: I'm talking about the -- the 2
14 percent that are nongeneric burglary. And in those 2
15 percent that are nongeneric burglary, the issue that is
16 raised, by the fact that it's nongeneric burglary, is you
17 can't make a determination based on the face of the record
18 of what was actually adjudicated, that this person was
19 actually found guilty of each element of generic burglary.
20 And when you cannot make that determination from record
21 documents and contemporaneous documents with the
22 adjudication, then you cannot make that determination
23 under the Armed Career Criminal Act.

24 JUSTICE SOUTER: Why can't you make the
25 determination? Isn't the -- the problem that your

1 determination may not be as reliable?

2 And I thought ultimately your argument would
3 boil down to saying this. The reason you will accept the
4 plea colloquy or the plea agreement, if it sets out the
5 facts, is that that is very reliable. It is a reliable
6 indication of what he was pleading guilty to and what the
7 court was finding him guilty of. But once you go beyond
8 that and you start looking into police reports appended to
9 complaints or whatnot, you're getting into an area of less
10 reliability, and when we're dealing with sentence
11 enhancements like this, we better be reliable. That's why
12 the statute based it on -- on offense rather than facts.
13 Don't get into a factual determination that is unreliable.
14 I thought that was your argument ultimately.

15 MS. THOMPSON: That -- that is part of the
16 argument, and I -- I think that we're just using different
17 terms here. You're using offense, and -- and the Taylor
18 court and the -- and the Armed Career Criminal Act use
19 conviction.

20 JUSTICE SOUTER: I -- I'll accept that, yes.

21 MS. THOMPSON: Okay. And so when you're talking
22 about a conviction, you're talking about something that
23 has already been established, that you should be able to
24 make a determination by looking at the contemporaneous
25 documents.

1 JUSTICE KENNEDY: But you -- you still haven't
2 given a reason, other than the one Justice Souter accepts.
3 Look it. This is a case where we all know what the truth
4 is, but you want to argue that we shouldn't find that out.
5 And it seems to me you have to give us a rationale for we
6 shouldn't know the truth here. You -- you don't want us
7 to find it, and there must be some reasons for that. And
8 the law does that once in a while. We all know that
9 something happened, but the law is supposed to pretend it
10 didn't. That's why Justice has a blindfold on. I -- I
11 know that. But you haven't given me one reason yet why I
12 should adopt your theory.

13 MS. THOMPSON: Well, the theory that I'm
14 proposing is -- is I believe the theory that's already
15 been adopted by this Court, which is the -- the one
16 described in Taylor. It's the categorical approach that
17 says you cannot make a determination of what elements were
18 adjudicated by looking at the underlying conduct.

19 JUSTICE SOUTER: But why is a categorical
20 determination important? I threw you a -- a bone a second
21 ago, and I said maybe it's because of --

22 MS. THOMPSON: It's --

23 JUSTICE SOUTER: -- a reliability concern. Is
24 that it? Is that your point?

25 MS. THOMPSON: It is reliable and it's also not

1 fact-based. Once you start to --

2 JUSTICE SOUTER: No, but is -- is your point
3 that once you get beyond the documents that you admit we
4 can look at, there is a higher -- an -- an unacceptably
5 high risk of unreliability? Is that your argument?

6 MS. THOMPSON: That is one of my arguments,
7 Justice Souter, and the -- and there's something that goes
8 hand in glove with that and did in this case. The burden
9 shifts then to the defendant. The burden shifts to the
10 defendant to prove that he was not convicted of generic
11 burglary, and that --

12 JUSTICE SOUTER: Well, but that -- that doesn't
13 necessarily follow.

14 MS. THOMPSON: -- assignment --

15 JUSTICE SOUTER: But that doesn't necessarily
16 follow from -- from looking at a police report. It may
17 well be that we would say the burden never shifts, and he
18 is simply in the position of any other party to a case.
19 If -- if the other side has put in evidence that is -- is
20 against his interest and he does nothing, then he's in
21 trouble. But that isn't the same as shifting the burden.

22 MS. THOMPSON: Well, it --

23 JUSTICE SOUTER: There's no -- I guess all I'm
24 saying is it doesn't follow from the argument that the
25 Government is making that a burden of persuasion shifts.

1 Isn't that correct?

2 MS. THOMPSON: What shifts is the risk of being
3 wrong. The shifts -- the risk of being wrong right now is
4 on the Government. If the Government cannot establish
5 that the defendant was convicted of generic burglary, it
6 bears that responsibility. If the defendant cannot
7 establish that back when he entered his plea --

8 JUSTICE SOUTER: Yes, but the Government --

9 JUSTICE STEVENS: Ms. Thompson, you know your
10 white light is on. So if you want to save time, you
11 should perhaps do so right now.

12 MS. THOMPSON: I would. Thank you very much.

13 JUSTICE STEVENS: Mr. Elwood.

14 ORAL ARGUMENT OF JOHN P. ELWOOD

15 ON BEHALF OF THE RESPONDENT

16 MR. ELWOOD: Justice Stevens, and may it please
17 the Court:

18 When a defendant has been convicted under a
19 State statute that prohibits both burglary of a building
20 and burglary of a car or some other item, the Court can
21 still look to the conviction to determine whether it is an
22 Armed Career Criminal Act predicate when, as here, the
23 police report indicates the defendant was arrested for
24 burglarizing a building rather than a ship or a car and
25 the other documents in the file corroborate that the basis

1 for the plea was the crime outlined in the police report.

2 Because two of the three elements of generic
3 burglary -- that is, breaking and entering and intent to
4 commit a crime --

5 JUSTICE STEVENS: May I ask this question?
6 Suppose the police report had been ambiguous and referred
7 to both a boat and a house. What would -- could -- would
8 it be -- what would you do in that case?

9 MR. ELWOOD: I think in a case where the police
10 report was ambiguous about what it is that the person
11 broke into, I think that you could not base the
12 enhancement on that. We are asking only when both the
13 police report is unambiguous and the documents recording
14 the guilty plea suggest --

15 JUSTICE STEVENS: But why -- why couldn't you
16 use it in the other case? Couldn't you ask the police
17 officer what he -- who conducted the investigation what
18 the facts really were?

19 MR. ELWOOD: I think you might be able to --

20 JUSTICE STEVENS: And you'd start out with the
21 premise that 90 percent of these cases are really houses
22 anyway, so there's a strong presumption in favor of the
23 Government?

24 MR. ELWOOD: I -- I think that you could talk
25 about introducing extrinsic evidence of -- of that sort.

1 We're not asking the Court to go that far, and I think in
2 the run-up cases --

3 JUSTICE STEVENS: So the -- the question in this
4 case is whether a police report is extrinsic evidence,
5 isn't it?

6 MR. ELWOOD: I don't think so in this case
7 because the police report is in -- in a police file
8 itself.

9 JUSTICE STEVENS: Well, suppose that it was an
10 assault and battery, for example, and you're trying to
11 decide whether it was violent or not, and the police
12 report was somewhat ambiguous. Could you -- you couldn't
13 look at it then.

14 MR. ELWOOD: No, and I don't think you could for
15 an additional reason, which is that I don't think assault
16 and battery is necessarily a -- is a necessary element of
17 the -- of -- of -- I'm sorry.

18 JUSTICE STEVENS: There's a distinction between
19 violent assaults and --

20 MR. ELWOOD: Right, violent and nonviolent.

21 JUSTICE STEVENS: -- nonviolent assaults.

22 MR. ELWOOD: Exactly right.

23 JUSTICE STEVENS: And you might want to find out
24 which one it was and -- and as here, it seems pretty easy.
25 Everybody knows most burglaries are -- are of houses. But

1 I'm just wondering if we're not trying to find out what
2 the categorical rule is that -- that is at stake here.

3 MR. ELWOOD: The only rule we are advocating is
4 that when we are talking about a necessary element of the
5 offense that can be satisfied in different ways, that you
6 can look to the police report to indicate which way it was
7 met in this case if the rest of the file, the State court
8 file, indicates that the police report was the -- provided
9 the factual basis or provided the basis for the
10 conviction.

11 And I think if you look at the file in this
12 case, for example, for four of the defendant's --

13 JUSTICE STEVENS: Well, you say it provided the
14 basis for the conviction. Was it presented to the court
15 in each of these cases?

16 MR. ELWOOD: We believe that the record
17 indicates that it was. For four of the defendant's
18 convictions, if you look at the document that records the
19 guilty plea, it -- it says -- in addition to the notation
20 of guilty, and as Justice Breyer averred, a check of admit
21 sufficient facts or that there are sufficient facts
22 present, it lists the same date of the offense, the same
23 street address, the same arresting officer, and the same
24 victim. And it is our submission that that implies
25 certainly very strongly -- it supports a very strong

1 inference -- that the crime of conviction was the very
2 same crime that is described in the police report.

3 JUSTICE GINSBURG: I thought Judge Gertner said
4 she didn't know whether anybody had seen this police
5 report. It wasn't attached to the charge. I thought that
6 was her position, that these are untested documents. We
7 don't know one way or another whether the judge that
8 accepted the plea had seen them.

9 MR. ELWOOD: To begin with, Judge Gertner looked
10 only to -- she didn't draw any inference based on the
11 document recording the guilty plea and what happened. She
12 looked only to the direct evidence of what happened in the
13 colloquy, i.e., the petitioner's affidavit.

14 But even more than that, her only finding was
15 that the police report, as a police report, was not
16 introduced at the plea colloquy. It wasn't marked as an
17 exhibit. It wasn't attached to anything. It wasn't
18 introduced as that. I don't think that's inconsistent
19 with the idea that as is often the case and is probably
20 usually the case, that the police report was synopsisized by
21 the prosecutor and -- and read at court, which would
22 explain why the offense of conviction has the same offense
23 date, same street address, same victim, same arresting
24 officer.

25 JUSTICE GINSBURG: But we don't have any

1 colloquy. We don't know what happened at the -- you're
2 saying it's -- it's altogether likely that that happened,
3 but we don't know.

4 MR. ELWOOD: But we do know that under
5 Massachusetts State law, that there -- before a court can
6 accept a guilty plea, there has to be a factual basis in
7 the record. There have to be facts in the record to
8 support every element of the offense.

9 JUSTICE GINSBURG: So if the defendant says,
10 yes, I plead guilty to this crime and the crime is
11 described as ship, vessel, car, building, and that's -- if
12 that's all that happened is the boiler plate charge that
13 just repeats the statute and the defendant says, yes, I
14 did that, but nothing tells us did what, other than
15 violate the statute.

16 MR. ELWOOD: The requirement -- the factual
17 basis requirement requires a statement of the facts, not a
18 statement of the legal conclusion, and simply reading the
19 charging document as a legal conclusion about what it --
20 about a boat, building, et cetera was broken into. What
21 it requires is a narrative description of the underlying
22 conduct so that the judge can satisfy him or herself to
23 what the defendant is pleading guilty to is actually a
24 crime. If he just says, I agree with the charging
25 document, if the underlying facts were he broke into a

1 grocery cart or a -- a refrigerator shipping box or
2 something, it might not satisfy the elements of the crime.

3 JUSTICE STEVENS: But couldn't the judge in that
4 colloquy have said to him, did you break into a building,
5 a car, or a boat? And he would have said yes, and
6 wouldn't that have satisfied the element of the crime?

7 MR. ELWOOD: I don't -- I don't think it would
8 have satisfied the factual basis requirement in that there
9 has to be a narrative description of what the defendant
10 did, like he showed up at that day and he broke into 258
11 Norwell Street. And I have yet to find a Massachusetts
12 case where a -- a guilty plea was accepted based on
13 basically just a recitation of the charging document --

14 JUSTICE O'CONNOR: Now, there's no record here
15 of the colloquy at the plea? Is that it?

16 MR. ELWOOD: No. There's -- there's no facts --
17 there's no -- as is the case often in guilty pleas, which
18 are not challenged on appeal, no colloquy was ever
19 prepared and apparently the tape recording was destroyed.

20 JUSTICE KENNEDY: But your test is whether or
21 not there's reliable record evidence? Is that -- that the
22 test?

23 MR. ELWOOD: Yes, whether there's reliable
24 record evidence that is reliable in describing what the
25 offense was that was the subject of the plea colloquy.

1 And in this case, we believe it is met both because the
2 police report is unambiguous, as several of the members of
3 the Court have averred to, and that the documents
4 recording the guilty plea I think very clearly indicate
5 that the thing that was at issue was the crime described
6 in the police report.

7 JUSTICE KENNEDY: Does it -- does the plea refer
8 to the police report?

9 MR. ELWOOD: No, it does not. It doesn't in so
10 many words refer to the police report, but it refers to --
11 it -- it, I think, unambiguously describes the crimes
12 described in the police report and that it involves, as I
13 said, the same date, the same street address, the same
14 victim, and the same arresting officer.

15 JUSTICE KENNEDY: Where do you draw the line?
16 Is there some -- I -- I take it that you say certainly if
17 the plea colloquy or the -- or the judge's guilt
18 determination refers to the police report, then the police
19 report comes in. Suppose there's no reference to the
20 police report.

21 MR. ELWOOD: I think that --

22 JUSTICE KENNEDY: Can we still go find the
23 police report and then where do we stop?

24 MR. ELWOOD: I think that if there's no
25 reference to the police report and if the police report is

1 not in the State court file, which it was in this case --
2 the court indicated it was in the State court file -- I --
3 I think that you would probably have to have a stronger
4 showing in order to say, well, he pleaded guilty to the
5 police report such as a -- a reference to the police
6 report or more of an indication on the guilty plea form, a
7 notation of -- of what was entered or --

8 JUSTICE KENNEDY: Well, you mentioned --

9 MR. ELWOOD: -- something that unambiguously
10 indicated the police report provided the factual basis for
11 the plea.

12 JUSTICE KENNEDY: You -- you mentioned the State
13 file. Is -- is the rule whatever is in the State file,
14 even if there's no reference to it? You had -- you had
15 two variables: one that there was reference to it; and
16 two, that it was in State file. Suppose there's no
17 reference, but it is in the State file. What -- I'm --
18 I'm not sure what rule you would draw?

19 MR. ELWOOD: The -- if -- I -- I think that
20 there has to be both an -- that the police report is
21 unambiguous and that there is reason to believe or that it
22 is more likely than not that the police report provided
23 the factual basis for the plea, and if it's -- if there's
24 no reference to it in so many words, I think the same
25 could be said this -- that the same could be said here in

1 this case. It doesn't say we look to the police report.
2 You just draw that inference from the fact that the crime
3 described looks like the crime described in the police
4 report.

5 JUSTICE BREYER: So what is your -- what rule
6 would you have here? The question is, was he convicted of
7 a crime of violence? 98 percent of the cases, all you
8 have to do is look to the crime charged, burglary, and the
9 fact that he was convicted. He pleaded guilty or didn't.

10 But there are these two -- three States I guess
11 that lump together in one code provision for breaking and
12 entering into a ship or a car or a house. So now we've
13 got to know which of the three it is. If they go to
14 trial, it's easy. Just look to the jury instructions. If
15 they plead guilty, I guess your opponents would say that's
16 the end of it. You can't use it because we don't ever
17 know from the charge itself which of the three it was that
18 was at issue. Was a house at issue? Was a car at issue?
19 Was a boat at issue? Now, you're going to say, but do a
20 little investigating to find out what was at issue. Look
21 at the police report. Is your view look at anything as
22 long as it's uncontested and clear?

23 Their argument is no matter what you look into,
24 once you go beyond that charging document, you're going to
25 find I think Justice Souter's point. It's going to be

1 ambiguous sometimes. You get into facts of things
2 happened years ago. It's just not worth it.

3 MR. ELWOOD: I think our argument -- or the --
4 the proposition that we are arguing for today is that when
5 the documents and the State court file indicate that the
6 defendant was arrested for only burglary of a building and
7 there's no question that it wasn't a ship or a vehicle,
8 that it will support the ACCA --

9 JUSTICE BREYER: Yes, but we're still going to
10 have to write something.

11 MR. ELWOOD: Correct. When --

12 JUSTICE BREYER: And what I want to know is
13 what's your rule.

14 MR. ELWOOD: Right. When the other documents in
15 the file indicate that it is more likely than not that the
16 police report or that that description of events served as
17 the basis for the guilty plea.

18 JUSTICE STEVENS: May I --

19 JUSTICE KENNEDY: So -- so we -- are we going to
20 decide -- decide a lot of probate cases about
21 incorporation by reference in wills and stuff?

22 MR. ELWOOD: I -- I think --

23 JUSTICE KENNEDY: I don't know what we're
24 supposed to do.

25 MR. ELWOOD: I think that in this case it just

1 -- I don't think the Court really has to get to the outer
2 reaches of this because in many of these cases, it's
3 overwhelming --

4 JUSTICE STEVENS: But if we don't get to the
5 outer reaches, the next case I suppose will involve a --
6 an application for a search warrant or an arrest warrant
7 which describes facts and pretty well tells you what
8 really happened. Could you rely on that?

9 MR. ELWOOD: No. Because the -- the important
10 thing is not just describing what actually happened, but
11 what -- what happened on the day the guilty plea was
12 taken. And that is where the documents that record the
13 plea I think come in to show --

14 JUSTICE STEVENS: Well, the police report wasn't
15 made on that date. The police report was prepared
16 earlier, I assume.

17 MR. ELWOOD: The police report was prepared
18 earlier, but when the crime -- when they wrote down
19 guilty, the offense he was guilty of is breaking into a
20 certain address at a certain day, belonging to a certain
21 victim, and involving the same arresting officer. And we
22 believe that --

23 JUSTICE STEVENS: But if it's that -- if it's
24 that explicit, I don't think you need the police report.

25 MR. ELWOOD: Well, perhaps because you can refer

1 to the police report.

2 JUSTICE STEVENS: It seems to me we're dealing
3 with a case in which the court documents are sufficiently
4 ambiguous that you have to look to something else. Then
5 the question is what other things may you look to, and you
6 say we can look to police reports. I say why not look at
7 warrant applications or maybe the prosecutor's notes, or
8 there could be other equally reliable documents available,
9 it would seem to me, that would -- which establish the
10 facts.

11 MR. ELWOOD: I think that you really only have
12 to look at -- the -- the fact that these are present in
13 the court's files and the fact that --

14 JUSTICE STEVENS: I thought the police reports
15 were not present in the court --

16 MR. ELWOOD: They are present in the court's
17 files. The court said they were present in the court's
18 files. They just said they didn't become part of the plea
19 colloquy because of --

20 JUSTICE SOUTER: Well, the -- the warrant
21 affidavit is going to be present in the files. It's --
22 it's returned. It's -- it's normally filed with -- with
23 the other papers in the case.

24 MR. ELWOOD: I think, though, that there's --
25 there would be no particular reason to believe that the

1 warrant application had been -- had served as the basis
2 for the guilty plea. I mean, if you had some sort of --

3 JUSTICE SOUTER: Why -- why not? I -- I mean,
4 are we going to imagine an entirely different case out of
5 the blue from the one that's disclosed in -- in the
6 warrant application? It seems to me that there's a -- a
7 relatively high degree of probability there.

8 MR. ELWOOD: If -- I -- I think that if the
9 documents recording the guilty plea indicate that the --
10 that the crime described is the crime described in the
11 warrant application, you probably could look at that if --
12 to determine if it was a boat or a building or --

13 JUSTICE SOUTER: Well, let's say the warrant
14 application says, you know, we're looking for a stolen
15 radio and the charge does indicate that he was -- that --
16 that the -- that the property taken in the burglary was a
17 -- was -- was a radio. Wouldn't that be a basis for
18 saying, okay, the warrant application probably discloses
19 what was going on here? If -- if the -- if it was a radio
20 on the warrant application, a radio in the burglary charge
21 to which he did plead guilty, probably it's the radio at
22 the address indicated in the warrant application. Isn't
23 that a fair inference?

24 MR. ELWOOD: Perhaps. The -- the whole thing
25 about the warrant application, though, strikes me as -- as

1 a little bit more attenuated, though, also because it's
2 done in advance of the police arriving on the scene and
3 discovering what's going on whereas the police report --

4 JUSTICE SOUTER: Well, it may be done in advance
5 by -- you know, by -- by a couple of hours from the -- the
6 police going in --

7 MR. ELWOOD: Right. But still it's -- it's done
8 beforehand as opposed to done after the crime has been
9 investigated.

10 JUSTICE SOUTER: What -- what about the -- the
11 police officer -- what -- what if we don't have a document
12 of any sort but the -- the State calls the police officer
13 who, in fact, made the application for the -- the issuance
14 of the complaint and he says, when I appeared to ask for
15 the issuance of the complaint, I testified to, I swore to
16 the following facts? I.e, that it was a house at such and
17 such Shaw Street. That gives you your contemporaneity
18 element. Why not accept that?

19 MR. ELWOOD: I think that under a sort of a --
20 theoretically that's a -- that is a theoretical
21 possibility, Justice Souter. I don't think that would
22 happen a lot in actual practice because the sort of people
23 who are prosecutorial witnesses have a sufficient caseload
24 that they're just never going to have in a -- a actual
25 recollection of specific events. And I can represent to

1 the Court that --

2 JUSTICE SOUTER: They have notes. But the
3 police all have little notebooks. That's what they use in
4 trial day in and day out. So it seems to me that -- that
5 if -- if contemporaneity is the -- is -- is -- or rough
6 contemporaneity is -- is the criterion, then on your
7 theory we ought to get into testimonial evidence.

8 MR. ELWOOD: It's -- it's both contemporaneity,
9 if I've said that correctly, but I think also a -- a
10 reason to infer that it provided the basis for the plea --
11 for the plea colloquy, which it is in this case because --

12 JUSTICE O'CONNOR: Well, I guess you would be
13 content with just relying on whatever was disclosed at the
14 plea colloquy in court.

15 MR. ELWOOD: That's correct. And --

16 JUSTICE O'CONNOR: And you would take -- you
17 would make the assumption, apparently, that on that
18 occasion the elements, the factual basis for the plea
19 would have been disclosed. But unfortunately, the record
20 has been destroyed.

21 MR. ELWOOD: It has been destroyed, but
22 Massachusetts State law requires that there be a factual
23 basis before the court can accept a guilty plea. And I
24 think we can -- under the presumption of regularity that
25 attaches to guilty pleas, you can presume that occurred.

1 JUSTICE O'CONNOR: You can just presume that the
2 proceeding was regular and it was disclosed. Is that
3 right?

4 Is -- under Massachusetts law is there any
5 difference in the penalty at all for burglary of a house
6 versus a motorcycle versus a car versus a vessel?

7 MR. ELWOOD: No, there isn't. They're all
8 punished the same. So it's not as though this was a -- a
9 lesser included or anything like that.

10 JUSTICE KENNEDY: So you want us to write the
11 opinion that we can presume that what's in the State
12 investigative files and records was likely before the
13 trial court? I -- I'd like to know what --

14 MR. ELWOOD: I don't think it --

15 JUSTICE KENNEDY: I don't know what I'm supposed
16 to write.

17 MR. ELWOOD: That when the -- basically when the
18 police report is unambiguous and when the documents in the
19 State court file indicate that the basis for the guilty
20 plea was the crime described in the police report, that
21 you can infer that the factual basis for the plea, which
22 is required under Massachusetts law, was in fact the
23 breaking into a building as opposed to a ship or a
24 vehicle and so forth.

25 JUSTICE STEVENS: Mr. Elwood, can I tell you

1 what's troubling me about that? Maybe the whole
2 categorical approach is unwise. It may have been more
3 strict than it should be. But it -- I'm puzzled by the
4 notion that in a case that's been tried to verdict, you
5 can only look at the indictment and the instructions, as I
6 understand Justice Blackmun's opinion. You could not look
7 at the testimony in the record, even though there are nine
8 witnesses who described what happened. It seems to me
9 that might be much more reliable than a police report.
10 And I'm just wondering am I correct, do you think, on
11 saying you cannot look at the testimony in the tried case?
12 And if so, how do you -- how do you say that police
13 reports are better than sworn witnesses?

14 MR. ELWOOD: I think to me it's not 100 percent
15 clear whether when Taylor referred to the jury
16 instructions and the charging documents, that that was
17 exhaustive of the jury trial conflict.

18 JUSTICE STEVENS: It's a for example thing.

19 MR. ELWOOD: Right. It could be something else.

20 But I think that if you were going -- it's still
21 possible to draw the distinction based on an
22 administrability factor, which is the way many courts have
23 looked at it, which is you don't want to have to have the
24 court look back to transcripts of the whole thing versus
25 -- for the whole trial, whereas if they can look at a

1 discrete body of documents and say yes, this guy pleaded
2 guilty to burglary of a building, that you can reach that
3 conclusion. It's a line of administrability, not a -- a
4 line of testimony with the documents.

5 JUSTICE STEVENS: The thing I'm just questioning
6 is whether this rule that you -- you're advocating is
7 really more administrable than one that just says it seems
8 crazy in this particular case. But -- but in the interest
9 of having a categorical administrative rule, we'll simply
10 say whatever the public record shows and the proceedings
11 themselves.

12 MR. ELWOOD: I think that it has proven
13 administrable. And it -- it -- I think that the majority
14 of courts allow you to look at court documents in order to
15 determine what was -- what sort of offense was at issue
16 and -- and that --

17 JUSTICE O'CONNOR: How should we interpret
18 Taylor? Do you -- do you agree with the interpretation
19 suggested this morning by Justice Breyer, for example?

20 MR. ELWOOD: I think it's definitely should be
21 interpreted to include guilty pleas because taking Taylor
22 literally, I mean, they only discussed jury trials. But
23 every court with criminal jurisdiction, every court of
24 appeals with criminal jurisdiction, has concluded that it
25 includes guilty pleas. And so I think it -- it does make

1 sense. I don't think that the Court would have in such a
2 short section of the opinion have exhaustively addressed
3 the entire scope of factual situations, and I don't think
4 it would have addressed the circumstance under which most
5 guilty pleas -- or rather, under which most convictions
6 are obtained --

7 JUSTICE BREYER: Well, then -- but reading it
8 that way, which is arguable, this case, but reading it
9 that way, you'd say you can look -- what we're interested
10 in is not what happened. We are interested in what kind
11 of a crime was at issue. And where it's difficult to
12 decide what crime is at issue, you can look to whatever
13 official documents are there at the time, any court
14 records, to make that determination, but there -- if there
15 is any indication that they're -- they're contested, if
16 there's any dispute as to what was at issue, then you
17 can't count it. Then it doesn't count. What about that
18 as a rule?

19 MR. ELWOOD: I -- I think that is a sensible
20 rule. I mean, basically our rule --

21 JUSTICE BREYER: So you'd say there's -- you can
22 look to what Justice Stevens says. You can look to what
23 is official in that record that seems to have indication
24 of reliability, and if there is any indication at all that
25 this was a matter in dispute, you can't count the

1 conviction. That would be the rule.

2 MR. ELWOOD: I -- I think that would be a
3 sensible rule. And in this case, as -- as we indicated,
4 not only are the police reports unambiguous, but there's a
5 very strong reason to believe that they were the basis for
6 the guilty plea as it was obtained on that day.

7 JUSTICE GINSBURG: Mr. Elwood, we had a case
8 last term involving a search warrant, Groh against
9 Ramirez, and it -- it was very clear that the application
10 for the warrant identified specifically what the police
11 were to search for, but the warrant itself didn't. And
12 this Court held you couldn't look behind that blank
13 warrant for the particulars that were revealed in the
14 warrant application. And I suppose this is similar in the
15 sense that we have the conviction and you're saying, but
16 you can look behind that conviction to something that, we
17 don't know, may or may not have been before the court.

18 MR. ELWOOD: As I recall Groh, that case
19 specifically turned on the fact that the face of the
20 Fourth Amendment requires that the warrant describe, not
21 that the supporting documents describe, the place to be
22 searched and the items to be seized. And I think in this
23 case we already know it's okay to look behind convictions
24 because Taylor itself says so. The only question is what
25 items are acceptable, and --

1 JUSTICE GINSBURG: Well, Taylor -- Taylor
2 doesn't quite have this full for example because there's
3 another paragraph following the for example paragraph
4 which says we hold an offense constitutes burglary for
5 purposes of 924(e) if either the statutory definition
6 corresponds to generic burglary, which it doesn't here, or
7 the charging paper, which it doesn't here, and jury
8 instructions, which the judge tells the jury you must find
9 this in order to convict. Those are not for examples.
10 That paragraph says you've got three things you can look
11 to. You can look to the statutory definition. You can
12 look to the charging paper, and you can look to the jury
13 instruction. And that's it.

14 MR. ELWOOD: I think, though, that in the
15 context that -- that is, if you're going to include guilty
16 pleas at all for these sort of straddle offenses that --
17 that some of the conduct is generic burglary and some
18 isn't, that if Taylor is accepted on face value, where it
19 isn't an example, then it -- it basically would mean that,
20 sub silentio, the -- the Court had held that guilty pleas
21 could not be used at all for this sort of inquiry under
22 the Armed Career Criminal Act, which I think would be
23 extraordinarily or -- or it would definitely limit at
24 least the utility of the ACCA as an act punishing
25 recidivism because the vast majority of convictions are

1 obtained through criminal --

2 JUSTICE STEVENS: Yes, but aren't the vast
3 majority of guilty pleas unambiguous? This is a rather
4 rare case.

5 MR. ELWOOD: But if the -- I don't think -- I
6 think that whenever there is a straddle crime and that the
7 charging document is --

8 JUSTICE STEVENS: Yes, whenever straddle crimes,
9 but -- but they're the exception rather than the rule.

10 MR. ELWOOD: That is probably the case. I know
11 that there are something like 28 States that have them.

12 JUSTICE STEVENS: But even burglary I think in
13 most States would be clear.

14 MR. ELWOOD: There -- there are many States that
15 -- that have offenses that include both generic and
16 nongeneric burglary, although I think that it's probably
17 true that most -- most burglary statutes are either
18 generic or nongeneric, not sort of straddled like that.
19 But in any event, I think it would significantly limit the
20 utility of the ACCA.

21 And in addition, every court of appeals with
22 criminal jurisdiction has held that that's not what it
23 means, that it does mean, as Justice Breyer indicated,
24 that that was one example that the Court meant. It is,
25 after all, a fairly abbreviated discussion that wasn't

1 briefed by the parties in the case, and I don't think that
2 the Court should read it so expansively based on
3 relatively ambiguous language.

4 If there are no further questions from the
5 Court, we'll rely on our submission.

6 JUSTICE STEVENS: Thank you, Mr. Elwood.

7 Ms. Thompson, you have a little over 3 minutes.

8 REBUTTAL ARGUMENT OF LINDA J. THOMPSON

9 ON BEHALF OF THE PETITIONER

10 MS. THOMPSON: Thank you, Justice Stevens.

11 First, I would like to point out that the Armed
12 Career Criminal Act does not punish all recidivism. It is
13 designed to punish the people who have prior convictions
14 for those offenses falling -- falling within the
15 categories. So it's not designed to punish all
16 recidivism.

17 Massachusetts does have generic burglary
18 statutes. These statutes that are at issue here are not
19 among them. But for the serious forms of burglary, such
20 as home invasion, Massachusetts punishes those under
21 generic burglary statutes. So those do exist.

22 With regard to the record that the Court can
23 look at in making this determination, it was significant
24 in the district court that Judge Gertner was not pointed
25 to the face of the complaint. And as you look at the

1 complaints that are shown in the third appendix in this
2 case, there is -- there are dates listed at the bottom.
3 The entries in those docket sheets were made at different
4 times, not all made at the time of a guilty plea. The
5 Government did not present any evidence to help the court
6 understand anything about the way the dockets were made
7 and the entries were made when a guilty plea was taken in
8 the district court.

9 The third thing of interest is, as Judge Gertner
10 found, there was no reason for a contemporaneous contest
11 of the evidence -- of the material in the police report
12 because the police report was not part of the plea
13 proceeding. So what happens is the district court that's
14 faced with the sentencing issue now has to make the
15 determination, can I now look and see whether there was
16 some contest years ago when the guilty plea was entered
17 without the aid of a contemporaneous record of
18 adjudication.

19 And what Mr. Shepard's position is, as to what
20 the -- the rule should be, is that where -- and we don't
21 contest even remotely that guilty pleas don't fall under
22 the ambit of the Armed Career Criminal Act. Taylor was a
23 guilty plea itself. That case was a guilty plea -- is
24 that where you have a nongeneric statute and you have a
25 conviction by a guilty plea, that the court can look at a

1 charging document and a contemporaneous formal record of
2 adjudication, not simply anything that's found in the
3 court file, and that must establish, based on that
4 examination, that the defendant was necessarily found
5 guilty of all the elements of generic burglary either by
6 his own admission or by a finding by the judge.

7 Thank you.

8 JUSTICE STEVENS: Thank you, Ms. Thompson.

9 The case is submitted.

10 (Whereupon, at 11:54 a.m., the case in the
11 above-entitled matter was submitted.)

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