No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD E. EVANS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether North Carolina second degree burglary (N.C. Gen. Stat. § 14-51), which encompasses unlawful entries into trailers used to store property, is categorically broader than the enumerated offense of burglary (*i.e.*, generic burglary) in the Armed Career Criminal Act (18 U.S.C. § 924(e))?

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States v. Evans, No. 17-2445-cr, Second Circuit (opinion entered May 8, 2019; order denying rehearing or rehearing *en banc* entered June 28, 2019).

United States v. Evans, No. 09-CR-00376, Western District of New York (judgment entered September 25, 2012; amended judgment entered July 10, 2017).

United States v. Evans, No. 12-4121-cr, Second Circuit (summary order and judgment entered on Nov. 1, 2013), petition for *certiorari* filed in *Evans v. United States*, No. 14-5908, Supreme Court and denied on October 6, 2014.[1]

[1] These proceedings challenged the District Court's denial of Evans's request to withdraw his guilty plea and are not at issue in this petition.

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In the Supreme Court of the United States

RONALD E. EVANS,
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v.

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ronald Evans respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's opinion is reported at 924 F.3d 21 (2d Cir. 2019) and attached to Petitioner's Appendix ("Pet. App.") at 1. The relevant portions of the transcript of the District Court's oral decision and judgment are attached at Pet. App. at 26. The Second Circuit's order denying Evans's petition for rehearing and rehearing *en banc* is attached at Pet. App. at 40.

JURISDICTION

The Second Circuit issued its judgment on May 8, 2019. Pet. App. at 1. A timely petition for rehearing and rehearing *en banc* was denied on June 28, 2019. Pet. App. at 40. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

18 U.S.C. § 924(e)(2)(B) (Pet. App. at 41-48) provides:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

North Carolina General Statues § 14-51 (Pet. App. at 50) defines common law burglary in the first and second degrees:

> There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. For the purposes of defining the crime of burglary, larceny shall be deemed a felony without regard to the value of the property in question.

North Carolina General Statutes § 14-54 (Pet. App. at 51) defines the statutory offense of breaking or entering buildings generally, which is a lesser-included offense of second degree burglary:

> (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.
>
> (a1) Any person who breaks or enters any building with intent to terrorize or injure an occupant of the building is guilty of a Class H felony.

> (b) Any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor.
>
> (c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

STATEMENT

On July 26, 2011, Ronald Evans pleaded guilty to being a felon in possession of a firearm. Evans acknowledged that his prior convictions for New York attempted burglary in the third degree in 1972, federal bank robbery in 1982, and federal armed bank robbery in 1983 were predicate offenses under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (the "ACCA"). *See Evans*, 09-cr-00376 (W.D.N.Y.), Dkt. 52 (Plea Agreement). The District Court determined that Evans was an armed career criminal and sentenced him to 180 months of imprisonment. *Id.*, Dkts. 83 (Judgment), 88 (Transcript of Sentencing).

Evans moved to vacate and correct his sentence under 28 U.S.C. § 2255. *Id.*, Dkt. 104. After his motion was filed, on June 26, 2015, the Supreme Court held that the ACCA's "residual clause" was unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015). The District Court subsequently ordered that Evans be resentenced, as his attempted burglary conviction was considered a violent felony only under ACCA's residual clause. *Evans*, 09-cr-00376 (W.D.N.Y.), Dkt. 124. At resentencing, the District Court relied on Evans's North Carolina second degree burglary conviction to resentence Evans as an Armed Career Criminal. *See* Pet. App. at 32-39.

Evans appealed, arguing that because North Carolina burglary applied to breaking and entering mobile conveyances, the offense was broader than generic burglary and could not predicate the ACCA punishment. *See* Pet. App. at 12 (*Evans*, 924 F.3d at 27). While Evans's

appeal was pending, the Supreme Court decided *United States v. Stitt*, 139 S. Ct. 399 (2018), and the Second Circuit affirmed the District Court's ACCA sentence, explaining that *Stitt* foreclosed Evans's argument. Pet. App. at 12-14 (*Evans*, 924 F.3d at 27). In *Stitt*, the Supreme Court held that burglary of nonpermanent or mobile structures that are adapted or used for overnight accommodation qualify as generic burglary. Pet. App. at 13 (*Evans*, 924 F.3d at 27). And, according to the Second Circuit, "North Carolina courts have held that a mobile structure qualifies [as a "dwelling house" or "sleeping apartment" for second degree burglary] only if 'the victim has made that trailer an area of repose, one which he can reasonably expect to be safe from criminal intrusion.'" Pet. App. at 13-14 (*Evans*, 924 F.3d at 27) (quoting *State v. Taylor*, 428 S.E.2d 273, 274 (N.C. Ct. App. 1993)). Thus, the Second Circuit concluded that "burglary under North Carolina law does not extend to the breaking and entering of a mere automobile, but instead aligns with the Supreme Court's definition of generic burglary, encompassing such unlawful entry of a vehicle that is 'adapted for or customarily used for lodging.'" Pet. App. at 14 (*Evans*, 924 F.3d at 27) (quoting *Stitt*, 139 S. Ct. at 406).

Evans petitioned for rehearing and rehearing *en banc* of the Second Circuit's decision. He argued that North Carolina second degree burglary remained broader than generic burglary after *Stitt* because it encompasses mobile conveyances used only for the storage of property (as opposed to habitation) and that the offense could be applied to mobile conveyances used only occasionally for habitation (*i.e.*, that are not *customarily* used for overnight accommodation). *See Evans*, No. 17-2245 (2d Cir.), Dkt. 97 (petition for rehearing). The Second Circuit denied his petition. Pet. App. at 40. This petition for *certiorari* follows.

REASONS FOR GRANTING THE PETITION

POINT I. THE COURTS OF APPEAL ARE MISAPPLYING THIS COURT'S PRECEDENTS ON THE SCOPE OF GENERIC BURGLARY.

Nearly three decades ago, this Court held that the "burglary" that was an ACCA predicate was "generic burglary" (*i.e.*, the offense of burglary as defined in the contemporary criminal codes of most states), which consisted of: (1) unlawful or unprivileged entry into, or remaining in, (2) a building or structure, (3) with intent to commit a crime. *Taylor v. United States*, 495 U.S. 575, 599 (1990). This Court has also found—multiple times—that some state statutes, which define burglary more broadly than the generic offense "by including places, such as automobiles and vending machines," cannot be ACCA predicates. *Id*.; *see also Mathis v. United States*, 136 S. Ct. 2243, 2250-51 (2016) (Iowa burglary statute was broader than generic offense because it reached land, water, or air vehicles in addition to any building or structure); *Shepard v. United States*, 544 U.S. 13, 16-17 (2005) (offense is "generic burglary" only if committed in a "building or enclosed space" and "not in a boat or motor vehicle").

In *Stitt*, this Court further clarified the scope of generic burglary, holding that it encompasses burglaries of structures or vehicles that have been adapted, or are customarily used, for overnight accommodation. 139 S. Ct. at 403-04. The statutes at issue in *Stitt* applied to vehicles designed or adapted for the overnight accommodation of persons (Tennessee), and to vehicles where any person lives or which are customarily used for the overnight accommodation of persons (Arkansas). *Id*. at 404. To reach this holding, the Court examined how "burglary" was defined by the States when ACCA was passed, finding that a majority of state statutes covered vehicles adapted or customarily used for lodging. *Id*. at 406. The Court also recognized that burglary was included in ACCA because it posed a risk of a "violent confrontation" between

the offender and another person, and vehicles designed or customarily used for overnight accommodation of persons, such as a mobile homes, RVs, or camping tents, presented such a risk. *Id*. But the Court also reaffirmed its previous holdings that ordinary vehicles, like those used only to store property and not to accommodate persons, were not within the scope of generic burglary because those vehicles presented a lower risk of violent confrontation. *Id*. The Court left open the question of whether the Arkansas statute, which applied to "a vehicle…[i]n which any person lives," was broader than generic burglary because it could "cover a car in which a homeless person occasionally sleeps." *Id*. at 407-08.

Thus, this Court's precedents make clear that a line exists between ordinary vehicles and vehicles designed or used for human accommodation, with ordinary vehicles used for property storage outside the scope of generic burglary. *Id*. at 407 (distinguishing the Iowa statute in *Mathis* because it had been construed to "cover ordinary vehicles because they can be used for storage or safekeeping," which was why "all parties agree[d]" that the statute was broader than generic burglary). But North Carolina second degree burglary—through its lesser included offense of breaking or entering—has been applied to vehicles used only to store property. These North Carolina offenses, therefore, are outside the scope of generic burglary and cannot be used as predicates for the ACCA punishment. But the Courts of Appeal considering these offenses have failed to appreciate the distinction between vehicles used for human accommodation and those used for only storage. This Court's review is needed to correct these errors and ensure that undeserving defendants do not serve the draconian 15-year mandatory minimum sentence.

A. North Carolina Second Degree Burglary (*via* its Lesser Included Offense of Breaking or Entering) Covers Vehicles Used Only to Store Property and, as such, cannot be an ACCA Predicate.

North Carolina courts construing North Carolina's breaking and entering offense[2] have applied the offense to cover breaking or entering vehicles used only to store property. For example, in *State v. Batts*, 617 S.E.2d 724 (N.C. Ct. App. 2005) (Table), the defendant was indicted for breaking and entering a trailer "used to store *and transport* musical equipment." *Id*. at *2 (emphasis added). He argued that a "trailer" was not a "building" under the statute, which defines "building" as "any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." *Id.* (citing N.C. Gen. Stat. § 14-54(c)) (emphasis omitted). The court rejected the challenge, noting that the victim testified that the trailer at issue "remain[ed] primarily at his residence until he ha[d] to perform with his band" and that he used "the trailer to store electronic music equipment and secure[d] it with a lock until needed." *Id*. at *3. Thus, according to the court, the trial court properly denied defendant's motion to dismiss because the State "presented sufficient

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[2] North Carolina's breaking or entering offense at N.C. Gen. Stat. § 14-54 applies to breaking or entering "any building," with "building" defined as "any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." N.C. Gen. Stat. § 14-54(a), (c). This offense is a lesser included offense of North Carolina second degree burglary, which is defined by common law. N.C. Gen. Stat. § 14-51. *State v. Jolly*, 254 S.E.2d 1, 5 (N.C. 1979) (citing *State v. Bell*, 200 S.E.2d 601 (N.C. 1973), *overruled in part on other grounds by State v. Collins*, 431 S.E.2d 188 (N.C. 1993)). Thus, the reasoning of courts that have construed "building" in the breaking or entering context is properly applied to second degree burglary. *State v. Weaver*, 295 S.E.2d 375, 378-79 (N.C. 1982) *overruled in part on other grounds by Collins*, 431 S.E.2d at 193 ("[A]ll of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense.").

evidence as to the trailer's use (a storage facility for personal property) and character of permanence such that a rational juror could conclude that the trailer was a 'building' within the meaning of [the breaking and entering statute]." *Id*.

And, in *State v. Bost*, 286 S.E.2d 632 (N.C. Ct. App. 1982), the court found that a trailer located on a construction site was a "building" under the breaking or entering statute because it was used to store tools and equipment and was "blocked up" while on the site (although it was "a reasonable inference" that the "trailer was mobile in the sense that it could be and probably was pulled from one construction site to another as the construction jobs were completed."). *Id*. at 634. Because the trailer was not used, and not intended to be used, to haul goods and personal property from place to place but, rather, was "blocked up" and not characterized by mobility, it became a "building" under the statute. *Id*. at 634-35.

These cases make clear that the definition of "building" is sufficiently broad that North Carolina's breaking or entering offense (and, consequently, its second degree burglary offense) includes *storage* trailers (*i.e.*, ordinary vehicles). Thus, North Carolina second degree burglary extends to burglaries of *ordinary vehicles used for storage* and cannot be an ACCA predicate.

B. By Finding that North Carolina Second Degree Burglary and Breaking or Entering are ACCA Predicates, the Courts of Appeal are Misconstruing *Stitt*.

The Courts of Appeal that have considered the North Carolina burglary offenses after *Stitt* have found that *Stitt* forecloses any argument that the offenses are broader than generic burglary. Pet. App. at 13-14 (*Evans*, 924 F.3d at 27) (second degree burglary); *Mutee v. United States*, 920 F.3d 624 (9th Cir. 2019) (breaking or entering); *United States v. Street*, 756 F. App'x

310, 311 (4th Cir. Feb. 19, 2019), *petition for certiorari pending Street v. United States*, 18-9364 (breaking or entering). These decisions misinterpret *Stitt*.

Stitt makes clear that burglaries of vehicles used for storage do not fall within generic burglary. 139 S. Ct. at 407 (distinguishing *Taylor* because the statute applied to "ordinary boats and vessels often at sea (and railroad cars often filled with cargo, not people)" and distinguishing *Mathis* because courts had construed that statute to "cover ordinary vehicles because they can be used for storage or safekeeping" which is "presumably why" all parties agreed that the offense was broader than generic burglary). But the Courts of Appeal fail to recognize that the North Carolina burglary offenses apply to these types of vehicles—*i.e.*, burglaries of ordinary vehicles used only for storage. *See Batts*, 617 S.E.2d at *3 (trailer used to store and transport musical equipment); *Bost*, 286 S.E.2d at 634 (trailer used to store tools and equipment on construction site). While the Ninth Circuit addressed *Bost*, noting that the trailer was "blocked up" and, thus, became permanent and immobile (*Mutee*, 920 F.3d at 627), it did not appreciate that the trailer was still a vehicle intended to be used to transport property (unlike, for example, a house or office building). *Bost*, 286 S.E.2d at 634 ("It is a reasonable inference from the evidence that the trailer was mobile in the sense that it could be and probably was pulled from one construction site to another as the construction jobs were completed.").

Significantly, vehicles used to store property do not present the risk of violence that impelled Congress to include burglary as an ACCA predicate. As the Supreme Court of North Carolina aptly cautioned, "[i]t is well to remember that the law of burglary is to protect people, not property." *State v. Fields*, 337 S.E.2d 518, 521 (N.C. 1985). The Second, Ninth, and Fourth Circuit decisions protect property—not people—by potentially subjecting defendants who commit burglaries of storage trailers to a 15-year mandatory minimum punishment.

The Second Circuit here suffers from an additional error: it equates a vehicle where a person can "reasonably expect to be safe from criminal intrusion" with a vehicle that "is adapted for or customarily used for lodging." Pet. App. at 14 (*Evans*, 924 F.3d at 27) (internal citations and quotations omitted). But these two types of vehicles are not the same. A person napping or talking on the phone in an ordinary, un-adapted vehicle may "reasonably expect to be safe from criminal intrusion." Indeed, in several contexts, ordinary vehicles have been recognized as spaces in which lawful occupants have a claim to control, dominion, and the ability to exclude others—in other words, the right to be safe from criminal intrusion.

For example, in North Carolina, a lawful occupant of a motor vehicle is presumed to have reasonably feared imminent death or serious bodily harm when using defensive force against an intruder, protecting that occupant from civil or criminal liability. N.C. Gen. Stat. § 14-51.2; *see also* N.C. Gen. Stat. § 20-4.01(23) (defining "motor vehicle" as "[e]very vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle"). This presumption is based on society's expectation that persons are entitled to be safe in their motor vehicles, regardless of whether they are using them for overnight accommodation. *See generally State v. Kuhns*, 817 S.E.2d 828, 830 (N.C. Ct. App. 2018) ("Commonly known as the 'castle doctrine,' the defense of habitation 'is based on the theory that if a person is bound to become a fugitive from her own home, there would be no refuge for her anywhere in the world.'") (quoting *State v. Stevenson*, 344 S.E.2d 334, 335 (N.C. Ct. App. 1986)). And, in the Fourth Amendment context, this Court recently acknowledged that even a driver who had not signed a rental car agreement may have a legitimate expectation of privacy in a rental car to be able to challenge a search of that car. *Byrd v. United States*, 138 S. Ct. 1518 (2018).

By extending *Stitt* to vehicles not adapted or customarily used for overnight accommodation, the Courts of Appeal are violating *Stitt*, a result that Congress did not intend and this Court did not direct. Review is needed here.

POINT II. THIS ISSUE RECURS FREQUENTLY AND REQUIRES THE COURT'S GUIDANCE.

The question of whether North Carolina's burglary offenses are within the scope of generic burglary is the subject of multiple petitions for *certiorari* before this Court: *Javontae Tyree Street v. United States*, No. 18-9364 (breaking or entering); *Malcolm Omar Robinson v. United States*, No. 19-5196 (breaking or entering), and *Rickie Markiece Atkinson v. United States*, No. 19-5572 (breaking or entering). And this issue will continue to recur because the Courts of Appeal continue to extend *Stitt* beyond its terms by applying *Stitt* to ordinary vehicles used to store property that are not adapted, or customarily used, for overnight accommodation. To ensure that only defendants deserving the ACCA punishment receive it, this Court should address the question and clearly delineate the borders of generic burglary.

This case presents an excellent vehicle for resolution. Before *Stitt*, Evans argued that the offense was broader than generic burglary because it had been construed to apply to mobile conveyances depending on their use. *Evans*, 17-2245 (2d Cir.), Dkt. 23 (principal brief). After *Stitt* and before the Second Circuit issued its decision, Evans continued to argue that the offense was broader than generic burglary. *Id*., Dkt. 86 (FRAP 28(j) letter). After the Second Circuit issued its decision, Evans moved for re-hearing, again arguing that *Stitt* did not compel the Second Circuit's decision and that the offense remained broader than generic burglary. *Id*., Dkt. 97 (petition for rehearing); *see Richards v. Jefferson Cty., Ala*., 517 U.S. 793, 797 n.3 (1996) (issue raised in petition for rehearing to Alabama

Supreme Court was preserved for review); *see also United States v. Sanjar*, 876 F.3d 725, 749 (5th Cir. 2017) (recognizing that party may raise arguments for first time in petition for rehearing when relying on intervening Supreme Court decision).

In any event, if this Court grants *certiorari* to any of the pending or future petitions addressing a North Carolina burglary offense under ACCA, it should hold this case for consideration and, if appropriate, vacate and remand this matter. 28 U.S.C. § 2106; *see Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (GVR order may alleviate "'[p]otential for unequal treatment' that is inherent in [the Court's] inability to grant plenary review of all pending cases raising similar issues") (citations omitted).

CONCLUSION

For the reasons described above, this petition for *certiorari* should be granted.

Dated: September 26, 2019

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APPENDIX A

17-2245-cr
United States v. Evans

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2018

Argued: September 24, 2018 Decided: May 8, 2019

No. 17-2245-cr

UNITED STATES OF AMERICA

Appellee,

-v.-

RONALD EVANS,

Defendant-Appellant,

TASHINE KNIGHTER,

Defendant.

Before: WESLEY, LIVINGSTON, *Circuit Judges*, and CRAWFORD, *District Judge*.*

* Judge Geoffrey W. Crawford, of the United States District Court for the District of Vermont, sitting by designation.

Defendant-Appellant Ronald Evans appeals the district court's June 16, 2017 decision and order resentencing him to 180 months' imprisonment following both his guilty plea to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), and the subsequent grant of his habeas petition on the ground that his original sentence was rendered retroactively invalid under *Johnson v. United States*, 135 S.Ct. 2551 (2015). Evans now claims that two of his ACCA predicates—second-degree burglary under North Carolina law and federal bank robbery—do not qualify as "violent felonies" under ACCA. We conclude that second-degree burglary under North Carolina law qualifies categorically as a violent felony under ACCA's "enumerated clause." We also conclude that federal bank robbery qualifies categorically as a violent felony under ACCA's "elements clause." The district court therefore did not err in determining that Evans was subject to ACCA's mandatory minimum term of imprisonment of 180 months. Accordingly, the judgment of the district court is AFFIRMED.

FOR APPELLEE: MONICA J. RICHARDS, Assistant United States Attorney, *for* James P. Kennedy, Jr., United States Attorney for the Western District of New York, Buffalo, New York.

FOR DEFENDANT-APPELLANT: REETUPARNA DUTTA, Hodgson Russ LLP, Buffalo, New York.

DEBRA ANN LIVINGSTON, *Circuit Judge*:

The Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B), imposes a 15-year mandatory minimum sentence if a defendant is convicted of being a felon in possession of a firearm following three prior convictions for a "violent felony." This appeal presents the latest entry in a series of cases defining offenses that qualify as "violent felonies" for an enhanced sentence under ACCA.

Specifically, this case calls upon us to answer two questions of first impression in this Circuit: (1) whether second-degree burglary in violation of North Carolina General Statute § 14-51 qualifies as a "violent felony" under ACCA's "enumerated clause"; and (2) whether federal bank robbery in violation of 18 U.S.C. § 2113(a) qualifies as a "violent felony" under ACCA's "elements clause." For the reasons outlined below, we answer these two questions in the affirmative and hold that both statutes are "violent felonies" within the ambit of ACCA. We therefore AFFIRM the July 14, 2017 judgment of the district court sentencing Defendant-Appellant Ronald Evans pursuant to ACCA (Richard J. Arcara, *Judge*).[1]

[1] Evans's Notice of Appeal, filed on June 30, 2017, refers only to the district court's sentence entered on June 16, 2017. The district court did not enter judgment until July 14, 2017. We construe Evans's Notice of Appeal as referring to the July 14th judgment. *See* Fed. R. App. P. 4(b)(2) ("A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry."); *see also Manrique v. United States*, 137 S.Ct. 1266, 1273 (2017) (construing Federal Rule of Appellate Procedure 4(b)(2)).

BACKGROUND

I. Factual Background[2]

Defendant-Appellant Ronald Evans ("Evans") was charged by way of a seven-count indictment with manufacturing and uttering counterfeit currency and conspiracy to manufacture and utter counterfeit currency, in violation of 18 U.S.C. §§ 471, 472, 473 and 2, and unlawful possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). On July 26, 2011 Evans pled guilty to the count of the indictment charging him with being a felon in possession of a firearm. ACCA provides that a person who violates § 922(g) and who has three previous convictions for a "violent felony" shall be imprisoned for a minimum of 15 years. 18 U.S.C. § 924(e). ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

[2] The factual background presented here is derived from undisputed facts from the parties' submissions, uncontroverted testimony presented at sentencing, and Evans's presentencing report.

Id. at § 924(e)(2)(B). The first clause is referred to as ACCA's "elements clause," *Stokeling v. United States*, 139 S.Ct. 544, 549 (2019), the first portion of the second clause—"is burglary, arson, or extortion"—as ACCA's "enumerated clause," *id.* at 556, and the remainder as ACCA's "residual clause," *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015). Evans acknowledged in his written plea agreement that he qualified as an armed career criminal based on three prior violent felony convictions, subjecting him to a 15-year mandatory minimum sentence. The district court accordingly sentenced Evans to 180 months' imprisonment on September 25, 2012.

On May 3, 2016 Evans filed a motion in conjunction with a previously filed habeas petition, asserting that his ACCA status had been rendered retroactively invalid under *Johnson*, 135 S.Ct. at 2257, which struck down ACCA's residual clause under the void-for-vagueness doctrine. The district court granted Evans's motion, concluding that his prior sentence had indeed been rendered retroactively invalid under *Johnson* because one of his three ACCA predicate convictions (for attempted burglary in the third-degree in violation of N.Y. Penal Law § 140.20) had qualified as a violent felony only under ACCA's voided residual clause. The district court, however, transferred the matter to the original sentencing judge for

resentencing, directing the court to consider whether any of Evans's *other* prior convictions could be substituted as ACCA predicates.

At a resentencing hearing held on June 16, 2017, the district court determined that among Evans's criminal history at least three offenses qualified as "violent felonies" under ACCA, such that Evans continued to face a mandatory minimum sentence of 15 years. Appendix ("A.") 477–505. First, Evans was convicted in 1982 of federal bank robbery in violation of 18 U.S.C. § 2213(a). According to his presentencing report, this conviction occurred after he approached a teller window at a bank branch in Buffalo, New York, and then handed the teller a blue tote bag and a demand note that read, "I have a gun fill bag." Next, in 1983, Evans was convicted of federal armed bank robbery in violation of 18 U.S.C. § 2113(d). The conduct underlying this conviction involved Evans and two co-conspirators entering a bank in Buffalo wearing ski masks and armed with a pistol and a shotgun, yelling "Everyone get down, this is a hold up!" Finally, Evans was convicted in 2001 in North Carolina of second-degree burglary in violation of N.C. Gen Stat. § 14-51. According to his presentencing report, this conviction occurred after he and an accomplice broke into a home, confined and restrained the victims therein, hit one victim with a hand gun and proceeded to

steal property with a combined value of $30,000. The district court determined that the first two offenses qualified categorically as violent felonies under ACCA's elements clause, and that the final offense qualified categorically as a violent felony under ACCA's enumerated clause. Accordingly, the district court re-sentenced Evans to 180 months' imprisonment, the same sentence as was originally imposed. This appeal followed.

DISCUSSION

Having laid out the facts surrounding Evans's appeal, we now set them aside in order to ascertain whether his predicate convictions qualify as crimes of violence under ACCA. *See Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016) ("Facts . . . are mere real-word things . . . . ACCA . . . cares not a whit about them." (internal citation omitted)). On appeal we consider Evans's claim that two of his ACCA predicates—second-degree burglary under North Carolina law and federal

bank robbery—do not categorically qualify as crimes of violence within the meaning of 18 U.S.C. § 924(e).[3] We conclude that they do.

I

We first consider whether Evans's conviction for second-degree burglary under North Carolina law qualifies as a "crime of violence" under ACCA's so-called "enumerated clause." By way of reminder, ACCA imposes a 15-year mandatory minimum sentence on defendants, such as Evans, who are convicted of violating § 924(g) and have already accrued three prior convictions for the commission of violent felonies. The enumerated clause defines "violent felony" to include any crime punishable by imprisonment for more than a single year, that, in relevant part, "is burglary, arson, or extortion." *See* 18 U.S.C. § 924(e)(2)(B)(ii).

To determine whether a past conviction is for an enumerated offense under ACCA, courts employ a "categorical approach." *Descamps v. United States*, 570 U.S. 254, 261 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *see also Mathis*, 136 S.Ct. at 2248–51 (outlining the categorical approach and applying it to a state burglary conviction). This approach requires us to evaluate a prior

[3] Evans concedes on appeal that his 1983 conviction for armed bank robbery in violation of 18 U.S.C. § 2113(d) is a qualifying offense.

conviction "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008). To do so, we "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood." *Descamps*, 570 U.S. at 257.

In other words, we identify "the minimum criminal conduct necessary for conviction under a particular statute," *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006) (per curiam), and determine whether *that* conduct falls within the scope of the "generic" definition of the crime. To show a predicate conviction is not a violent felony, there must be "'a realistic probability, not a theoretical possibility,' that the statute at issue could be applied to conduct that does not constitute" a violent felony. *United States v. Hill*, 890 F.3d 51, 56 (2d Cir. 2018) (quoting *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193 (2007)).

As noted above, Evans was convicted in 1982 of second-degree burglary under North Carolina law. Although ACCA enumerates "burglary" as a "violent felony," pursuant to the categorical approach not every offense labeled as "burglary" under *state* law qualifies as a violent felony under ACCA. *Taylor*, 495

U.S. at 602; *Mathis*, 136 S.Ct. at 2250–51 (holding that where the parties agreed that Iowa's burglary statute "cover[ed] more conduct than generic burglary does" the statute did not qualify as a violent felony under ACCA); *see also Descamps*, 570 U.S. at 282 (Alito *J.*, dissenting) ("While the concept of a conviction for burglary might seem simple, things have not worked out that way . . . ."). To determine whether a past conviction for burglary qualifies as a violent felony under ACCA, courts employing the categorical approach accordingly "compare the elements of the crime of conviction with the elements of the 'generic' version" of burglary. *Mathis*, 136 S.Ct. at 2247. Thus, we focus here on whether the elements of North Carolina second-degree burglary "are the same as, or narrower than, those of generic burglary." *Descamps*, 570 U.S. at 282. We conclude that they are and therefore that Evans's conviction for second-degree burglary under North Carolina law qualifies as a violent felony under ACCA.

The Supreme Court has defined "generic burglary" as the "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *United States v. Stitt*, 139 S.Ct. 399, 405–06 (2018) (quoting *Taylor*, 495 U.S. at 598). Thus, in order to qualify categorically, a state burglary

offense must require (1) the unlawful or unprivileged entry (2) into a dwelling (3) with the intent to commit a crime.

North Carolina defines common law burglary as "the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein." *State v. Williams*, 333 S.E.2d 708, 720 (N.C. 1985). Moreover, State appellate court decisions clarify that an "unlawful or unprivileged entry" is also an essential element of common law burglary. *United States v. Mack*, 855 F.3d 581, 586 (4th Cir. 2017) (citing *State v. Upchurch*, 421 S.E.2d 577, 588 (N.C. 1992)); *see also United States v. Walker*, 595 F.3d 441, 443–44 (2d Cir. 2010) (noting that in employing the categorical approach "[a] statute is not merely analyzed on its face; rather, we consider the statutory language as it has been elucidated by the relevant state's courts").

Common law burglary occurs in the second-degree in North Carolina when:

> committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime.

N.C. Gen. Stat. § 14-51. Thus, in order to obtain a conviction for second-degree burglary in North Carolina, the State must prove (i) the unlawful breaking and

entering (ii) in the nighttime (iii) into a dwelling house or sleeping apartment (iv) unoccupied at the time of the offense (v) with the intent to commit a felony therein.

At first glance, second-degree burglary under North Carolina law would not appear to be broader than the generic definition of burglary. And indeed, the Fourth Circuit has already concluded that *first-degree* burglary in North Carolina satisfies the generic definition of burglary for the purposes of applying the United States Sentencing Guidelines (the "Guidelines"). *See Mack*, 855 F.3d at 586.

Evans argues on appeal, however, that second-degree burglary under North Carolina law is broader than the generic definition of burglary because it can encompass unlawful entry into mobile conveyances. He relies on a few North Carolina cases to support his argument. *See, e.g.*, *State v. Taylor*, 428 S.E.2d 273, 274 (N.C. Ct. App. 1993) (holding that an eight by twelve-foot trailer parked on a farm qualifies as a "dwelling" for the purpose of affirming a first-degree burglary conviction); *State v. Douglas*, 277 S.E.2d 467, 470 (N.C. Ct. App. 1981), *affm'd at* 285 S.E.2d 802 (N.C. 1982) (defining "an unoccupied mobile home" as a "building" for the purposes of N.C. Gen. State § 14-54, a lesser included offense of second-degree burglary). Evans points also to the Supreme Court's decision in *Taylor v. United States*, which, he argues, indicated that burglary of certain nontypical structures

and vehicles falls outside the scope of generic burglary. *See Taylor*, 495 U.S. at 599 (noting that some states "define burglary more broadly" than generic burglary "by including places, such as automobiles and vending machines, other than buildings").

The mobile home door left slightly ajar by *Taylor*, however, has been closed shut by the Supreme Court's more recent opinion in *Stitt*, holding that "burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as 'burglary' under [ACCA]." *Stitt*, 139 S.Ct. at 404–06. The Court reasoned that such a definition satisfies the "generic" definition of burglary because it accords with state criminal codes at the time of ACCA's passage. *Id.* at 406. Moreover, the Court noted, in passing ACCA, Congress would have viewed burglary of a vehicle used for overnight accommodation as inherently dangerous because "[a]n offender who breaks into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily used for lodging runs a . . . risk of violent confrontation." *Id.*

Following *Stitt*, then, it is clear that second-degree burglary under North Carolina law fits within the generic definition of burglary. North Carolina's statute and the case law surrounding it establish that second-degree burglary

criminalizes only breaking and entering into a "dwelling house" or "sleeping apartment." N.C. Gen. Stat. § 14-51. North Carolina courts have held that a mobile structure qualifies as such only if "the victim has made that trailer an area of repose, one which he can reasonably expect to be safe from criminal intrusion." *Taylor*, 428 S.E.2d at 274. Thus, burglary under North Carolina law does not extend to the breaking and entering of a mere automobile, but instead aligns with the Supreme Court's definition of generic burglary, encompassing such unlawful entry of a vehicle that is "adapted for or customarily used for lodging." *Stitt*, 139 S.Ct. at 406.

In sum, even though a *mobile* home can qualify as a "dwelling house" under North Carolina law, such a definition, as *Stitt* makes clear, does not broaden the statute beyond ACCA's reach. We therefore hold that second-degree burglary in violation of N.C. Gen. State § 14-51 qualifies as a violent felony under ACCA's enumerated clause.

II

Evans next argues that his prior conviction for federal bank robbery in violation of 18 U.S.C. § 2113(a) does not categorically qualify as a violent felony

under ACCA's elements clause. By way of reminder, ACCA's elements clause defines the term "violent felony" as "an offense that is a felony" and

> (i) has as an element the use, attempted use, or threatened use of physical force against the person or property of another.

8 U.S.C. § 924(e). The federal bank robbery statute provides:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . .
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a).

To address Evans's claim we again apply the "categorical approach." *Stokeling*, 139 S.Ct. at 554–55 (applying the categorical approach in holding that robbery under Florida law qualifies as a predicate violent felony under ACCA's elements clause). "This approach, familiar by now, involves two steps: first we identify the elements of the predicate conviction by determining the minimum criminal conduct a defendant must commit to be convicted; second, we determine whether that minimum criminal conduct has as an element the use, attempted use, or threatened use of physical force." *United States v. Moore*, 916 F.3d 231, 240 (2d

Cir. 2019) (internal quotation marks omitted). Once more, we may not "consider the facts of the offense conduct . . . under the rigidly structured regime of categorical analysis." *Villanueva v. United States*, 893 F.3d 123, 128 (2d Cir. 2018) (internal quotation marks and citation omitted).

Evans argues that federal bank robbery does not categorically qualify as a crime of violence under ACCA's elements clause because the offense "encompasses 'intimidation' and 'extortion' as 'means' by which the offense can be accomplished." Br. Def-Appellant at 30. First, we need not address Evans's argument regarding bank robbery "by extortion" because we agree with the Ninth Circuit that § 2113(a) "contains at least two separate offenses, bank robbery and bank extortion." *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018). Because Evans was convicted of bank *robbery*—indeed Congress amended the statute *after* his conviction to include bank extortion, Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646 § 68, 100 Stat. 3592, 3616 (amending 18 U.S.C. § 2113(a))—we need not decide whether bank extortion qualifies as a crime of violence.

Evans's argument therefore hinges entirely on whether bank robbery "by intimidation" is categorically a crime of violence. In answering this question "we

do not write on a blank slate." *Hill*, 890 F.3d at 56. As we recently observed in concluding that federal credit union robbery qualifies as a crime of violence for the purposes of 18 U.S.C. § 924(c), "this circuit, in a summary order, and our sister circuits, in published opinions, have consistently held that federal bank robbery by intimidation is a crime of violence under the force clause of various sentence enhancement Guidelines and statutes."[4] *United States v. Hendricks*, 2019 WL 1560582 at *5 (2d Cir. Apr. 11, 2019) (quotation marks omitted). These decisions have rejected the same argument that Evans advances here.[5] As the Fourth

[4] 18 U.S.C. § 924(c)(3)'s "force clause" defines the term "crime of violence" as "an offense that is a felony" and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* at § 924(c)(3)(A). We have noted the similarities between ACCA's "elements clause" and § 924(c)(3)'s "force clause" and have accordingly looked to cases analyzing ACCA's elements clause to interpret the "similarly . . . worded" force clause presented in 924(c)(3)(A)). *Hill*, 890 F.3d at 56. We have done the same with § 4B1.2 of the Guidelines, which defines "crime of violence" for purposes of the "career offender" enhancement, U.S.S.G. § 4B1.1(a), as an offense that is a felony and that "has as an element the use, attempted use, or threatened use of physical force against the person of another," U.S.S.G. § 4B1.2(a)(1); *see also United States v. Walker*, 595 F.3d 441, 443 n.1 (2d Cir. 2010) ("Given the substantial similarity between the [ACCA's] definition of 'violent felony' and the [Guidelines'] definition of 'crime of violence,' authority interpreting one phrase frequently is found to be persuasive in interpreting the other phrase.") (alterations in original) (quoting *United States v. Winter*, 22 F.3d 15, 18 n.3 (1st Cir. 1994)).

[5] *See United States v. Ellison*, 866 F.3d 32, 39–40 (1st Cir. 2017) (holding that federal bank robbery qualifies as a crime of violence under the Guidelines' career offender "force clause"); *United States v. Brewer*, 848 F.3d 711, 715–16 (5th Cir. 2017) (same); *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) (same); *United States v. Wright*, 957 F.2d 520, 521–22 (8th Cir. 1992) (same); *United States v. Jones*, 932 F.2d 624, 625 (7th Cir. 1991) (same);

Circuit has persuasively argued, "[a] taking 'by force and violence' entails the use of physical force. Likewise, a taking 'by intimidation' involves the threat to use *such force*." *United States. v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016) (emphasis added); *see also United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017) ("'[I]ntimidation' as used in the federal bank robbery statute requires that a person take property in such a way that would put an ordinary, reasonable person in fear of bodily harm, which necessarily entails the threatened use of physical force." (internal quotation marks omitted)); *United States v. Jones*, 932 F.2d 624, 625 (7th Cir. 1991) ("There is no 'space' between 'bank robbery' and 'crime of violence' . . . because violence in the broad sense that includes a merely threatened use of force is an element of every bank robbery.").

The decades-old out of circuit case law on which Evans relies in arguing to the contrary merely confirms that bank robbery by intimidation necessarily involves the threat to use force. Evans cites to instances where a defendant was

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United States v. Gutierrez, 876 F.3d 1254, 1256–57 (9th Cir. 2017) (holding that federal bank robbery is a crime of violence under § 924(c)(3)(A)); *United States. v. McNeal*, 818 F.3d 141, 156–57 (4th Cir. 2016) (same); *see also United States v. Horsting*, 678 F. App'x 947, 949–50 (11th Cir. 2017) (unpublished opinion) (concluding that federal bank robbery constitutes a "violent felony" under ACCA); *Kucinski v. United States*, No. 16-cv-201-PB, 2016 WL 4444736, at *3 (D.N.H. Aug. 23, 2016) (noting that "a number of courts have rejected these same arguments, and determined—unanimously, it appears—that federal bank robbery constitutes a violent felony under the ACCA").

convicted of bank robbery after making an emphatic written demand for money, absent explicitly threatening to use force or violence. *See, e.g.*, *United States v. Henson*, 945 F.2d 430, 439 (1st Cir. 1991) (affirming bank robbery conviction where evidence demonstrated that defendant stood within two feet of the teller and handed her a note directing her to "put fifties and twenties into an envelope now!!"); *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980) (affirming bank robbery conviction where evidence demonstrated that defendant told teller that "she had 'three seconds' to give him the money in the top drawer, and then repeated this demand"). Contrary to Evans's assertion, these examples establish that where a defendant commits bank robbery without engaging in acts of force or violence, he necessarily invokes "the *threat* to use . . . force." *McNeal*, 818 F.3d at 153 (emphasis added). And a defendant issuing such a threat does not need to "specif[y] . . . any particular means in order [for that threat] to be effective." *Hill*, 890 F.3d at 59. In other words, a demand to "give me all your money" carries with it an implicit threat of force. Only in "backing down in the face of these threats [do] the victims avoid physical force." *United States v. Pereira-Gomez*, 903 F.3d 155, 166 (2d Cir. 2018) (holding that attempted robbery in the second degree

under New York law qualifies as a "crime of violence" under the Guidelines' "force clause").

Evans also argues that "intimidation" for the purposes of § 2113(a) requires only "putting the victim in fear of bodily harm," *United States v. McCormack*, 829 F.2d 322, 324 (2d Cir. 1987), and that the threatened use of physical force is not, in fact, essential to placing a person in such fear. Evans contends—though he cites to no case law on the subject—that federal bank robbery could theoretically be achieved by threatening to "injure" a victim via an indirect means such as "poison." Br. Def-Appellant at 34. We reject this argument as well.

First, for the purposes of applying the categorical approach, "hypotheticals are insufficient" because a defendant must show that there is a "realistic probability" that federal bank robbery would reach the conduct Evans describes. *Hill*, 890 F.3d at 58 (internal quotation marks omitted). The categorical approach "requires more than the application of legal imagination to a . . . statute's language." *Deunas-Alvarez*, 549 U.S. at 193. Evans has not unearthed an

example of "bank robbery by poison," so his attempt at applying "legal imagination" to the federal bank robbery statute must accordingly fail, *id.*[6]

Next, we have already rejected the argument that placing another in fear of injury—even indirect injury—does not involve a threat or use of force, *see Hill*, 890 F.3d at 59–60, and we do so again today. As we held in *Hill*:

> [A] robbery still has as an element "the use, attempted use, or threatened use of physical force against the person or property of another," notwithstanding that it is accomplished by threatening to poison a victim, rather than to shoot him. Some threats do not require specification of any particular means in order to be effective; yet they still threaten *some* type of violence and the application of *some* force. Consider: "That's a nice car—would you like to be able to continue driving it?"

Id. at 59. Evans suggests that our decision in *Hill* is not binding here because it relied on the Supreme Court's decision in *Castleman*, which interpreted the word "force" as employed in connection with a different statute, 18 U.S.C. § 922(g)(9) (defining a misdemeanor crime of violence). *See United States v. Castleman*, 572 U.S. 157, 168 (2014). But *Hill* applied *Castleman*'s reasoning to 18 U.S.C. § 924 (at

[6] Furthermore, *McCormack*, on which Evans relies, does not define "intimidation" for the purposes of interpreting the federal bank robbery statute, as Evans contends. Instead, the decision merely recites the jury instructions given by the district court in that particular case. *See McCormack*, 829 F.2d at 324–25 (holding that it was "inconceivable that any juror, after finding that [the defendant] pointed a gun at the bank teller and threatened to blow her head off, would conclude that she was not intimidated").

issue here), noting that there was "no persuasive reason why the same principle should not apply to the construction of § 924(c)(3)." *Hill*, 890 F.3d at 59. We find *Castleman's* reasoning equally persuasive in the present case.[7]

For the numerous reasons catalogued above, federal bank robbery "requires the use or threat of force in order to overcome the victim's resistance to the theft," *Moore*, 916 F.3d at 242 (citing *Stokeling*, 139 S.Ct. at 555), and therefore qualifies as a "violent felony" under ACCA's elements clause.

* * *

The aspirations behind the categorical approach first articulated in *Taylor* were worthy ones. The Supreme Court hoped to remain faithful to "ACCA's text and history[,] . . . avoid[] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries[, a]nd . . . avert[] 'the practical difficulties and potential unfairness of a factual approach.'"

[7] Recent Supreme Court guidance interpreting ACCA's elements clause buttresses our conclusion that federal bank robbery qualifies as a crime of violence under ACCA. The Supreme Court has now established that threatened force need not be of a particular strength in order to fall within ACCA's elements clause. *Stokeling*, 139 S.Ct. at 554. "Force" is "violent" for the purposes of ACCA if it is sufficient to "overcome the victim's resistance . . . however slight that resistance might be." *Id*. at 550. Thus, while Evans attempts to distinguish between the use of "*some* force" or "*indirect* force" and the use of "*violent* force," his proffered distinctions must fail. Evans has not offered an example of federal bank robbery that does not involve force sufficient to "overcome the victim's resistance," and this court has been unable to conceive of one.

Descamps, 570 U.S. at 267 (quoting *Taylor*, 495 U.S. at 600–01). But the laudable goals motivating this approach have not been realized. *See Mathis*, 136 S.Ct. at 2258 (Kennedy *J.*, concurring) (labeling the categorical approach "a system that each year proves more unworkable"); Transcript of Oral Argument at 26, *Stitt*, 139 S.Ct. (No. 17-765) (Alito *J.*) (characterizing the Court's categorical approach jurisprudence as "one royal mess").

In hindsight, judicial difficulties with the categorical approach might have been expected. The approach demands that federal courts employ an analysis for which they are not constitutionally (or practically) suited. While cases such as Evans's undoubtedly pose an actual case or controversy as the Constitution demands, *see* U.S. Const. art. III § 2, cl. I, the categorical approach paradoxically instructs courts resolving such cases to embark on an intellectual enterprise grounded in the facts of *other* cases not before them, or even *imagined* scenarios. Courts are required to discern the outer reaches of countless federal and state statutory provisions in an exercise most reminiscent of the law school classroom, and quite alien to courts' well-established role of adjudicating "concrete legal issues, presented in actual cases, not abstractions." *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947) (quotation marks omitted).

A solution lies with two sources: Congress, which can "amend[] the ACCA," and the Supreme Court, which may "revisit its precedents in an appropriate case." *Mathis*, 136 S.Ct. at 2258 (Kennedy *J.*, concurring) (calling for a reconsideration of the categorical approach should "continued congressional inaction" persist). Mindful of the competing textual, constitutional, and practical concerns underpinning the categorical approach, we offer no opinion as to which of the many proposed solutions—from a conduct-specific approach[8] to eliminating mandatory minimums[9]—may be appropriate. We ask only that Congress or the Supreme Court take action. Until such time, the litany of ACCA challenges will continue, as will our efforts faithfully to apply the categorical approach, however

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[8] *See, e.g.*, U.S. Sent'g Commission, Proposed Amendments to the Federal Sentencing Guidelines (Dec. 13, 2018), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20181213_News-Release.pdf (announcing proposed amendment to the Guidelines that would "enable the sentencing courts to consider the conduct that formed the basis of the offense of conviction" in light of the "extensive litigation" and "inconsistent sentencing outcomes" that have resulted from the categorical approach).

[9] *See, e.g.*, Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 221–22 (1993) (arguing that Congress should eliminate mandatory minimums in favor of greater reliance on discretionary Guidelines, which "can achieve a substantial degree of determinacy, predictability, uniformity and even severity . . . [while still] preserv[ing] discretion . . . and allow[ing] sufficient flexibility to avoid the inequities and process costs that rigid mandatories entail"); *see also United States v. Booker*, 543 U.S. 220, 223 (2005) (explaining that "advisory [sentencing] provisions that recommend[], rather than require[], the selection of particular sentences in response to differing sets of facts, . . . would not implicate the Sixth Amendment").

awkward its demand that judges deciding cases act, instead, the part of law school professors spinning out hypotheticals.

CONCLUSION

We conclude that second-degree burglary under North Carolina law qualifies categorically as a crime of violence under ACCA's enumerated clause and that federal bank robbery qualifies categorically as a crime of violence under ACCA's elements clause. We therefore AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	Case No. 1:09-CR-00376
	)	(RJA)(HKS)
Plaintiff,	)	
	)	
vs.	)	June 16th, 2017
	)	
RONALD EVANS,	)	
	)	
Defendant.	)	

TRANSCRIPT OF RESENTENCING
BEFORE THE HONORABLE RICHARD J. ARCARA
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

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THE COURT: My purpose now is to get the proper application. I have already read his letter, I think it's 17 or 18 other letters, along with all the other documents that you submitted that are all part of this book that I have here.

MS. DUTTA: Thank you, Judge.

THE COURT: The defendant, Ronald Evans, stands before the Court for sentencing following a vacation of his sentence, pursuant to 28 United States Code, Section 2255.

On July 26th, 2011, Mr. Evans pleaded guilty to being a felon in possession of a firearm and ammunition, in violation of Title 18, United States Code, Section 922(g)(1) and 924(e). On September 10th, 2012, the Court sentenced Mr. Evans to 180 months imprisonment and four years supervised release. The Court's sentence was the lowest sentence the law allowed and for the Court to impose because in his plea, he agreed that he had been convicted of three prior violent felonies.

The defendant therefore qualified for a mandatory minimum sentence under the Armed Career Criminal Act. Specifically, the defendant admitted, as part of his plea agreement, that his prior conviction for attempted burglary in the third degree, armed bank robbery and bank robbery, subjected him to the Armed Criminal Acts' 15-year mandatory minimum sentence.

On June 17, 2016, Judge Michael Telesca, a judge and

member of this court, vacated the defendant's sentence, pursuant to 28 United States Code, Section 2255. Judge Telesca concluded that after the Supreme Court decision in *Johnson v. United States* at 135 S. Ct. 2551 (2015), the Court (sic defendant) prior conviction for attempted burglary in the third degree no longer qualified as a violent felony within the meaning of the Armed Career Criminal Act. The defendant is now before the Court for resentencing, following Judge Telesca's decision.

Now, I know that counsel have had a chance to review the presentence report, including the revisions that were made after the initial disclosure. You have reviewed those with your client, at least in pertinent parts?

MS. DUTTA: Yes, Your Honor.

THE COURT: Okay. I will now place the presentence investigation report in the record under seal. If an appeal is filed, counsel on appeal will be permitted access to the sealed report, except that counsel will not be permitted access to the recommendation section.

The parties have filed the appropriate statement of parties with respect to sentencing factors. There is no dispute about the facts contained in the report and therefore, the Court adopts these facts as its findings of fact and hereby incorporates them into the record.

Before proceeding -- by the way, I read all the

papers. I don't believe any oral argument is necessary.

Before proceeding to the defendant's objections, the Court briefly describes the Armed Career Criminal Act's framework for enhancing sentencings, since the Act is central to the defendant's objections in this case.

A person who is found guilty of certain firearm offenses, such as being a felon in possession of a firearm, and who has three prior convictions for "a violent felony or a serious drug offense or both" -- by the way, I told the court reporter that when I say quote, just put in the transcript quotation marks, rather than spell out the word quote, okay?

Let me repeat that. A person who is found guilty of certain firearm offenses such as being a felon in possession of a firearm and who has three prior convictions for "a violent felony or a serious drug offense or both," is subject to the 15-year mandatory minimum sentence.

The basic issue in this case is whether several of the defendant's prior convictions are "violent felonies," as the Act defines that term. A prior conviction is "a violent felony", if it is either (1), has an element for the use, the attempted use or threatened use of physical force against the person or -- of another; or (2), is a burglary, arson or extortion or involved in the use of explosive. See 18 U.S.C. Section 924(e).

With that background, the Court will now turn to the

defendant's objections. Defendant has filed a number of objections to each of the presentence investigation reports that the probation office has prepared. After extensive briefing, as well as concessions by the government, the probation officer and the defendant, the parties have narrowed the issues the Court must resolve to a handful.

Both parties are -- and I mean this sincerely -- are to be commended for excellent advocacy, as well as for making appropriate concessions when necessary. This has significantly aided the Court's consideration of the very complicated questions before the Court.

After defendant's objections and supplemental objections, the probation office no longer maintains, for purposes of calculating the base offense level, that the defendant has prior convictions for crimes of violence that would result in an enhanced base offense level under Guideline Section 2K2.1(a)(2) or (a)(4). Thus, the probation office maintains that the base offense level is properly calculated as 14, pursuant to Guideline Section 2K2.1(a)(6)(A).

Next, the government no longer maintains that the defendant is procedurally barred from contesting whether his prior bank robbery conviction qualifies as a crime of violence under the Armed Career Criminal Act. The Court will hereinafter refer to the Armed Criminal Act simply as "the Act."

Further, after the government filed it's *Shepard* documents, the defendant no longer maintains that as to his second robbery conviction, that is for the 1983 bank robbery conviction, he pled guilty to the first paragraph of 18 U.S.C. 2113(a).

And finally, after the Supreme Court decision in *Beckles v. The United States* at 137 S. Ct. 886, 2017, defendant has withdrawn his argument regarding the 2009 edition of the guidelines.

There are, therefore, four issues for the Court to resolve. The first two issues raise procedural objections to the Court's ability to resentence the defendant as an armed career criminal. The second two issues concern whether certain of the defendant's prior convictions are "violent felonies", within the meaning of the Armed Career Criminal Act.

First, the defendant argues that the Court may not, at resentencing, use prior convictions as armed career criminal predicate offenses if the defendant did not agree, in his plea agreement, that those offenses would count as armed career criminal predicates.

Addressing a different issue, but in the context similar to this case, the Second Circuit has held that when a defendant is resentenced after obtaining habeas relief, a district court has "broad and flexible remedial authority", to

way the defendant suggests. *United States v. Hill* at 832 F.3d 135 at pages 142 and 143 (2d Cir. 2016), quoting *Duenas-Alvarez* at 549 U.S. at page 193.

In other words, even if, as a general matter, extortion can be committed without the use, attempted use or threatened use of physical force, the defendant points to no case involving a 2113(a) bank robbery by extortion conviction in which extortion involves something less than the use, attempted use, or threatened use of physical force.

In sum, the Court concludes that the defendant's 1983 robbery conviction is a "violent felony" within the meaning of the Act.

The fourth and final issue the Court must resolve, as part of the defendant's objections, is that the defendant's argument that the 1999 second-degree burglary conviction in North Carolina does not qualify as a "violent felony" within the meaning of the Act.

The Court initially notes that the Courts of Appeals for the Fourth Circuit have summarily concluded that the North Carolina second-degree burglary is a "violent felony," under the ACCA. However, the Court did so without analysis in a non-precedential opinion. See *United States v. Riley* at 542 Fed. App'x 290, at pages 291 and 292 (4th Cir. 2013.)

Given the circumstances of the Fourth Circuit's holding, because the opinion does not address any of the many

issues raised by the defendant here, the Court will proceed to resolve the defendant's objection.

Burglary is an enumerated crime under the Act's definition of "violent felony." See United States Code 924(e)(2)(B)(ii). Thus, the Court must view to the generic definition of burglary and decide whether the North Carolina statute "as construed by the Courts of that state only criminalizes conduct that falls within the federal definition of the predicate offense." *United States v. Walker* at 595 F.3d 441 at page 444 (2d Cir. 2010).

The generic definition of burglary is "An unlawful or the unprivileged entry into or remaining in a building or other structure with intent to commit a crime." *Taylor* versus United States at 495 U.S. 575 and page 598 (1990).

If a state burglary statute is construed by that state's court "reaches a broader range of places" than simply "a building or other structures," then a conviction for violating the state statute is not an armed career criminal predicate burglary conviction. *Mathis vs. United States* at 136 S. Ct. 2243 at 2250 (2016).

In relevant part, in North Carolina, second-degree burglary statute criminalizes burglary of "a dwelling, house or sleeping apartment." North Carolina, in general statute 14-51.

The question in this case is whether the term,

"dwelling house," is interpreted by the North Carolina Courts reaches more places than "a building or other structure." That's *Taylor* at 495 U.S. at page 598.

In support of his argument that the North Carolina second-degree burglary is broader than the generic definition of burglary, the defendant relies heavily on *State v. Taylor* at 109 N.C. App. 692 at page 695, which is a 1993 decision from the North Carolina Court of Appeals, North Carolina's intermediate appellate court.

In *Taylor*, the North Carolina Court of Appeals found that a travel trailer was a "dwelling" for the purpose of North Carolina's burglary statute. This was because the Court concluded the most relevant consideration to the question whether something is a "dwelling" is whether a person made that thing "his living quarters" or "an area of repose, one which he can reasonably expect to be safe from criminal intrusion." 109 N.C. App. at 694 and 695.

The Court of Appeals therefore rejected the defendant's argument that a travel trailer is not "a dwelling," simply because the trailer was mobile, rather than a permanent structure. Relying on *Taylor*, the defendant here argues that North Carolina's second-degree burglary statute, as interpreted by a North Carolina Courts, reaches more places than simply a "building or other structure," because the statute covers mobile or non-permanent conveyances such as

potentially a mobile trailer, a boat or an automobile.

The defendant has raised a very close and very difficult argument. The question the Court must ultimately answer is whether, based on *Taylor*, there is a "realistic probability, not a theoretical possibility" that North Carolina Courts would interpret the second-degree burglary to include conduct that falls outside of the general definition of burglary. That's *Alvarez* at page -- well, at page 549 U.S., at page 183. Just one second.

The Court initially notes that since it was decided in 1993, *Taylor* does not appear to have ever been cited by North Carolina State Court. Nor, until recent -- until several weeks ago, did a report of a federal case interpret the Armed Career Criminal Act or similar provisions of federal law, considering the applicability of *Taylor* to the interpretation of the North Carolina burglary.

On May 17th, 2017, however, in *Harris* v. The United States at 217 West Law at 2177980, United States District Court for the Western District of North Carolina concluded that *Taylor* "appears to be an outlier based upon the Court's review of the North Carolina Court's application of common and statutory law." The *Harris* Court based this inclusion on several factors.

First, the *Harris* Court looked to the common law definition of "dwelling," which the Court found was

incorporated into the North Carolina definition of burglary. *Harris* observed that the common law meaning of "dwelling" was a "mansion house".

Harris next relied on a recent Fourth Circuit decision, *U.S. v. Mack* at 855 F.3d 581, (4th Cir. 2017), which held first-degree burglary under North Carolina law is not a crime of violence under the career criminal provision of the sentencing guidelines. The *Harris* Court reasoned that if first-degree burglary qualified as a crime of violence under the guidelines, second-degree burglary must qualify as a violent felony under the Armed Career Criminal Act.

To distinguish *Taylor*, the *Harris* Court also relied on a Civil War-Era decision from the North Carolina Supreme Court, *State v. Jake*. In pertinent part, *Jake* observed that a log cabin was a "dwelling", because it was "substantial" and "permanent" and because it was different "from a tent or a booth erected in a market or a fair in which no burglary could be committed, although the owner lodges in it". That's 1864 West Law 1070 at 2.

Finally, the *Harris* Court relied on "the relationship between North Carolina's common law burglary offense and its statutory offense of breaking and entering a building." Quote -- this is a long quote, 217 West Law 2177980 at page 4. Specifically, *Harris* noted that the North Carolina Court of Appeals has interpreted North Carolina's breaking-and-entering

statute to cover, generally, permanent structures and also that in North Carolina, breaking-and-entering in a lesser included offense of burglary. Thus, *Harris* concluded that if *Taylor* correctly interpreted the North Carolina burglary statute, then the Court would -- by the way, I -- that quote where it began ends at -- no, that's okay. I did state that. I want to make sure I get this correct. Okay.

Thus, *Harris* concluded that, if *Taylor* correctly interpreted the North Carolina burglary statute, that the Court would "recognize an exception to the North Carolina Court holdings that chapters 14-54(a), that is, breaking-and-entering, is a lesser included offense of common law burglary". 217 West Law at 2177980 at page 7.

For these reasons, *Harris* held that *Taylor* was "an outlier" and that "there does not appear to be a realistic probability that North Carolina's common law burglary offense protects enclosures the United States Supreme Court has expressly excluded from generic burglary." *Harris* at page 8.

This is a very close all. The defendant offers persuasive arguments distinguishing each of the grounds on which *Harris* relied. But ultimately, the Court believes it is constrained by the Fourth Circuit's recent holding that the first-degree burglary is a crime of violence.

The defendant first notes that the North Carolina Supreme Court decision in *Jake* relies on "functional

application" to determine whether a particular conveyance is a dwelling. *Jake* can certainly bear this interpretation and states that the North Carolina burglary statute protects "the place of an owner's purpose". This is consistent with the *Taylor* Court's analysis of the term dwelling, which also looked to whether a place burglarized was a place of repose.

Further responding to the *Harris* Court's analysis of the North Carolina breaking and entering, the defendant notes that the North Carolina Supreme Court has affirmed an intermediate court decision which found that a mobile home that was not affixed to the premises is a "building" within the meaning of the North Carolina breaking and entering statute. See *State v. Douglas* at 285 S.E. 2d. 802, (N.C. 1982).

These are both very reasonable arguments and the defendant makes a strong case that, at the very least, the State of North Carolina law on the point appears to be somewhat confused.

However, as the Court noted, feels constrained by the Fourth Circuit's recent decision in *U.S. v. Mack*. In *Mack*, as noted, held that the purpose of the definition of the term "crime of violence" under the 2014 edition of the guidelines "A North Carolina conviction of first-degree burglary under North Carolina general statute 14-51 categorically matches the generic definition of burglary of a dwelling in Guideline

Section 4B1.2(a)". See 855 F.3d at 586 and as the *Harris* Court held, "If first-degree burglary in North Carolina matches the generic definition of burglary, second-degree burglary does as well." *Harris* at page 5.

The defendant argues that *Mack* does not consider the case law in arguments discussed earlier and that it was inconsistent with other Fourth Circuit precedents interpreting similar statutes and other statements in the Fourth Circuit. However, whether or not *Mack* was correctly decided, it represents an interpretation of the North Carolina criminal law from the Federal Court of Appeals in which North Carolina is located.

The Court therefore feels that it is effectively bound by the *Mack* interpretation. It follows, then, that the Court must interpret second-degree burglary in North Carolina as a violent felony under the Armed Career Criminal Act. Thus, although it's a very close case, the Court concludes that the defendant's conviction for second-degree burglary in North Carolina is "a violent felony" within the meaning of the act. The defendant is therefore subject to the enhanced 15-year mandatory penalty in the Armed Career Criminal Act.

Having resolved these objections, the Court will now calculate the applicable guidelines. The PSR recommends that the defendant's base offense level is 14, pursuant to Guideline Section 2K2.1(a)(6)(A). However, because the

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of June, two thousand nineteen.

United States of America,

Appellee,

v.

Tashine Knightner,

Defendant,

Ronald Evans,

Defendant - Appellant.

ORDER

Docket No: 17-2245

Appellant, Ronald Evans, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX D

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)

18 U.S.C.A. § 924

§ 924. Penalties

Effective: December 21, 2018
Currentness

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other

term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(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).

(2) As used in this subsection--

(A) the term “serious drug offense” means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that--

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.--

(1) In general.--

(A) Suspension or revocation of license; civil penalties.--With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) Review.--An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) Administrative remedies.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

CREDIT(S)

(Added Pub.L. 90-351, Title IV, § 902, June 19, 1968, 82 Stat. 233; amended Pub.L. 90-618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1223; Pub.L. 91-644, Title II, § 13, Jan. 2, 1971, 84 Stat. 1889; Pub.L. 98-473, Title II, §§ 223(a), 1005(a), Oct. 12, 1984, 98 Stat. 2028, 2138; Pub.L. 99-308, § 104(a), May 19, 1986, 100 Stat. 456; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-570, Title I, § 1402, Oct. 27, 1986, 100 Stat. 3207-39; Pub.L. 100-649, § 2(b), (f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3817, 3818; Pub.L. 100-690, Title VI, §§ 6211, 6212, 6451, 6460, 6462, Title VII, §§ 7056, 7060(a), Nov. 18, 1988, 102 Stat. 4359, 4360, 4371, 4373, 4374, 4402, 4403; Pub.L. 101-647, Title XI, § 1101, Title XVII, § 1702(b)(3), Title XXII, §§ 2203(d), 2204(c), Title XXXV, §§ 3526 to 3529, Nov. 29, 1990, 104 Stat. 4829, 4845, 4857, 4924; Pub.L. 103-159, Title I, § 102(c), Title III, § 302(d), Nov. 30, 1993, 107 Stat. 1541, 1545; Pub.L. 103-322, Title VI, § 60013, Title XI, §§ 110102(c), 110103(c), 110105(2), 110201(b), 110401(e), 110503, 110504(a), 110507, 110510, 110515(a), 110517, 110518(a), Title XXXIII, §§ 330002(h), 330003(f)(2), 330011(i), (j), 330016(1)(H), (K), (L), Sept. 13, 1994, 108 Stat. 1973, 1998, 1999, 2000, 2011, 2015, 2016, 2018, 2019, 2020, 2140, 2141, 2145, 2147; Pub.L. 104-294, Title VI, § 603(m)(1), (n) to (p)(1), (q) to (s), Oct. 11, 1996, 110 Stat. 3505; Pub.L. 105-386, § 1(a), Nov. 13, 1998, 112 Stat. 3469; Pub.L. 107-273, Div. B, Title IV, § 4002(d)(1)(E), Div. C, Title I, § 11009(e)(3), Nov. 2, 2002, 116 Stat. 1809, 1821; Pub.L. 109-92, §§ 5(c)(2), 6(b), Oct. 26, 2005, 119 Stat. 2100, 2102; Pub.L. 109-304, § 17(d)(3), Oct. 6, 2006, 120 Stat. 1707; Pub.L. 115-391, Title IV, § 403(a), Dec. 21, 2018, 132 Stat. 5221.)

18 U.S.C.A. § 924, 18 USCA § 924
Current through P.L. 116-34. Some statute sections may be more current, see credits for details.

End of Document

APPENDIX E

West's North Carolina General Statutes Annotated
Chapter 14. Criminal Law
Subchapter IV. Offenses Against the Habitation and Other Buildings
Article 14. Burglary and Other Housebreakings (Refs & Annos)

N.C.G.S.A. § 14-51

§ 14-51. First and second degree burglary

Currentness

There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. For the purposes of defining the crime of burglary, larceny shall be deemed a felony without regard to the value of the property in question.

Credits
Amended by Laws 1969, c. 543, § 1.

N.C.G.S.A. § 14-51, NC ST § 14-51
The statutes and Constitution are current through S.L. 2018-145 of the 2018 Regular and Extra Sessions, including through 2019-59, 2019-103, of the General Assembly, subject to changes made pursuant to the direction of the Revisor of Statutes.

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APPENDIX F

West's North Carolina General Statutes Annotated
Chapter 14. Criminal Law
Subchapter IV. Offenses Against the Habitation and Other Buildings
Article 14. Burglary and Other Housebreakings (Refs & Annos)

N.C.G.S.A. § 14-54

§ 14-54. Breaking or entering buildings generally

Effective: December 1, 2013
Currentness

(a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.

(a1) Any person who breaks or enters any building with intent to terrorize or injure an occupant of the building is guilty of a Class H felony.

(b) Any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor.

(c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

Credits
Amended by Laws 1955, c. 1015; Laws 1969, c. 543, § 3; Laws 1979, c. 760, § 5; Laws 1979 (2nd Sess.), c. 1316, § 47; Laws 1981, c. 63, § 1, Laws 1981, c. 179, § 14; Laws 1993, c. 539, § 26, eff. Oct. 1, 1994; Laws 1994, (1st Ex.Sess.), c. 24, § 14(c), eff. March 26, 1994; S.L. 2013-95, § 1, eff. Dec. 1, 2013.

N.C.G.S.A. § 14-54, NC ST § 14-54
The statutes and Constitution are current through S.L. 2018-145 of the 2018 Regular and Extra Sessions, including through 2019-59, 2019-103, of the General Assembly, subject to changes made pursuant to the direction of the Revisor of Statutes.

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