

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 2019

JONATHAN MONTERIO DAVIDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. DOES NORTH CAROLINA'S OFFENSE OF FELONIOUS BREAKING AND/OR ENTERING QUALIFY AS A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT?

LIST OF PARTIES

All parties to this case appear in the caption of cases on the cover page.

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UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jonathan Monterio Davidson, respectfully requests that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Fourth Circuit issued on April 27, 2020, affirming Petitioner's sentence.

OPINIONS BELOW

A Panel of the Fourth Circuit Court of Appeals affirmed Petitioner's sentence by Opinion filed April 27, 2020, a copy of which appears as Appendix A.

JURISDICTION

This petition is filed within 90 days of the decision of the Court of Appeals and is therefore timely. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(2)(B) provides in pertinent part the following:

[T]he 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...

STATEMENT OF THE CASE

On October 30, 2018, a grand jury sitting in the Middle District of North Carolina returned a two-count indictment in which Petitioner and two co-defendants were charged with one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g), and one count of possession of a stolen firearm in violation of 18 U.S.C. § 922(j). On January 25, 2019, Petitioner pled guilty to one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). Petitioner’s plea of guilty was pursuant to a written plea agreement filed with the court on January 18, 2019. The presentence investigative report, revised on August 26, 2019, determined Petitioner qualified for sentencing as an armed career criminal under 18 U.S.C. § 924(e). The presentence report determined Petitioner’s three qualifying felonies consisted of multiple convictions for North Carolina breaking and/or entering. Petitioner objected to the report’s determination that he had three qualifying predicate felonies. Petitioner appeared for sentencing on August 29, 2019. The court overruled Petitioner’s objections to the presentence

report and sentenced him as an armed career criminal. The trial court ultimately sentenced Petitioner to a term of 126 months imprisonment to run concurrent with one state sentence, but consecutive to other state sentences. The sentence was to be followed by a term of three years of supervised release. The remaining count of the indictment was dismissed. Petitioner filed a timely notice of appeal on September 22, 2019. Petitioner's sentence was affirmed on appeal by a panel of the Fourth Circuit Court of Appeals by opinion dated April 27, 2020.

STATEMENT OF THE FACTS

On September 3, 2014, Petitioner was convicted of multiple counts of felony breaking and/or entering in Durham County Superior Court, Durham, North Carolina. On August 21, 2018, there was a breaking and entering reported at a residence on 7222 Morrow Mill Road, Chapel Hill, North Carolina, in which several items were reported stolen, including four firearms. The person reporting the breaking and entering saw a white Honda Accord departing the area at a high rate of speed. Later in the day, a white Honda Accord matching the description previously provided was stopped by an Orange County sheriff's deputy. The vehicle, registered to Petitioner, was occupied by him and two others, Deshawn Bailey and Gabriel Harris. Harris initially provided a fictitious name and was arrested for resisting arrest. Petitioner was wearing a GPS tracking device as part of the conditions of his state probation. A review of the data obtained from the GPS tracker showed Petitioner had been present at 7222 Morrow Mill Road on August 21, 2018. Both Harris and Bailey cooperated and provided information regarding

the breaking and entering at 7222 Morrow Mill Road. They identified the location for the recovery of the four stolen firearms.

REASONS FOR GRANTING THE WRIT

Rule 10 of the Supreme Court Rules sets forth the general considerations governing review on certiorari. Subsection (e) of Rule 10 specifies that a United States Court of Appeals decision on an important question of federal law that has not been, but should be, settled by this Court is a reason for granting certiorari. In 2015, this Court decided *Johnson v. United States*, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2013), which held that the residual clause of 18 U.S.C. § 924(e) was unconstitutional. In 2018, this Court again faced the question of defining the term of “violent felony” under federal law. This time the Court addressed the definition of “violent felony” under 18 U.S.C. § 16. *Sessions v. Dimaya*, 584 U.S. _____, 138 S. Ct. 1204, 200 L. Ed. 2d 594 (2018). The Court’s decisions in this area of the law have spawned much litigation as the lower courts wrestle with the definition of the term “violent felony.”

In the instant case, the Court of Appeals’s determination that the North Carolina crime of felonious breaking and/or entering qualifies as a violent felony creates an opportunity for this Court to give further clarification to the lower courts as to the proper interpretation of the term “violent felony” under 18 U.S.C. § 924(e) and most importantly, how to interpret that term in light of this Court’s decision in *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013).

The North Carolina breaking and/or entering offense under N.C.G.S. § 14-54(a) is unusual. By its terms, the statute does not require a breaking occur or that the entry be otherwise “unlawful or unprivileged.” This Court’s decision in *Descamps, supra*, clarifies that an intent to commit a felony inside does not convert an otherwise lawful entry into an unlawful or unprivileged entry:

[G]eneric burglary’s unlawful-entry element excludes any case in which a person enters premises open to the public, no matter his intent; the generic crime requires breaking and entering or similar unlawful activity.

133 S. Ct. at 2292.

In the courts below, defendant argued that his conviction for felonious breaking and/or entering under North Carolina law could not constitute a crime of violence because the North Carolina breaking and/or entering statute does not, by its terms, require as an element that a breaking occur or that the entry be otherwise “unlawful or unprivileged.” Accordingly, the North Carolina offense is broader than generic burglary and thus does not qualify categorically as an ACCA predicate.

In *United States v. Mungro*, 754 F.3d 276 (4th Cir. 2014), the Fourth Circuit rejected this argument finding that the North Carolina Supreme Court had judicially tailored the scope of N.C.G.S. §14-54(a) in *State v. Boone*, 297 N.C. 652, 256 S.E.2d 683 (1979). In *Boone*, the North Carolina Supreme Court held that “an entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under [N.C.G.S. §] 14-54(a).” 256 S.E.2d at 687. But the *Boone* court expressly noted that

its holding did not mean that an entry with consent would, in all cases, provide a defense to a § 14-54(a) charge. Instead, it provided “that there may be occasions when subsequent acts render the consent void *ab initio*, as where the scope of consent as to areas one can enter is exceeded or the defendant conceals himself in a building until a time he is not authorized to be there in order to facilitate a theft.” *Id.* at 687 n.3 (internal citations omitted).

Since *Boone*, the North Carolina Court of Appeals has interpreted *Boone* more broadly. For example in *In re SDR*, 191 N.C. App. 552, 664 S.E.2d 414 (2008) and *State v. Rawlinson*, 198 N.C. App. 600, 679 S.E.2d 878 (2009) the court upheld convictions under N.C.G.S. §14-54(a) where the defendants had entered buildings that were open to the public but had ultimately stolen items from offices located in those buildings that, while open to the public, the court found were not open to those defendants by invitation. Under those circumstances, the Court of Appeals, in both cases, upheld the defendant’s conviction for felonious breaking and entering. These holdings return N.C.G.S. §14-54(a) to its more broad interpretation. The *Mungro* opinion dismisses these two Court of Appeals decisions as lower court decisions that are inconsistent with the North Carolina Supreme Court’s opinion in *Boone*. However, both *State v. Rawlinson*, *supra*, and *In re SDR*, *supra*, are North Carolina Court of Appeals interpretations of *Boone*. Neither opinion has been reversed by the North Carolina Supreme Court and, accordingly, are authoritative statements of the law in North Carolina interpreting the scope of N.C.G.S. § 14-54(a) as set out in the North Carolina Supreme Court decision in *Boone*, *supra*.

For an offense to qualify as generic burglary, the entry itself must be “unlawful or unprivileged” at the time; it cannot simply be *deemed* unlawful after the fact because a person’s subsequent actions demonstrate an intent to steal. See *Descamps*, 133 S. Ct. at 2292 (“[G]eneric burglary’s unlawful-entry element excludes any case in which a person enters premises open to the public, no matter his intent.”). That same principle applies here: N.C.G.S. § 14-54(a)’s entry element is broader than the entry element of the generic offense because the prosecution need not prove that the entry was “unlawful or unprivileged” at the time. It can instead rely on subsequent events to deem that consent void from the beginning. See *In re SDR*, 664 S.E.2d at 420; *Rawlinson*, 679 S.E.2d at 884. Indeed, as shown by the decisions in *In re SDR* and *Rawlinson*, the offense of breaking-or-entering under § 14-54(a) – like the offense at issue in *Descamps* – encompasses acts that are the functional equivalent of simple shoplifting. See *Descamps*, 133 S. Ct. at 2282. Accordingly, an N.C.G.S. § 14-54(a) conviction does not categorically qualify as an ACCA predicate.

Petitioner respectfully argues the Fourth Circuit Decision in the instant case based on its holding in *United States v. Mungro*, *supra*, that the North Carolina offense of breaking and/or entering qualifies as a violent felony under the Armed Career Criminal Act is in conflict with this Court’s decision in *Descamps*, *supra*. Petitioner urges this Court to use its writ of certiorari to take up this question and examine the Fourth Circuit’s rulings on the North Carolina crime of breaking and/or entering.

CONCLUSION

For reasons stated above, this Court should grant Petitioner's petition for writ of certiorari and review the opinion of the panel of the Fourth Circuit Court of Appeals to define the term "violent felony" in the instant case, and to provide further guidance to the lower courts on this important federal question.

Respectfully submitted this the 11th day of June 2020.

/s/ John D. Bryson

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APPENDIX A

Fourth Circuit Court of Appeals Opinion filed on April 27, 2020
Affirming Petitioner's Sentence

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-4708

UNITED STATES OF AMERICA,**Plaintiff - Appellee,****v.****JONATHAN MONTERIO DAVIDSON,****Defendant - Appellant.**

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, District Judge. (1:18-cr-00419-CCE-3)

Submitted: April 20, 2020

Decided: April 27, 2020

Before WYNN and QUATTLEBAUM, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

John D. Bryson, WYATT EARLY HARRIS WHEELER, LLP, High Point, North Carolina, for Appellant. Matthew G.T. Martin, United States Attorney, Terry M. Meinecke, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jonathan Monterio Davidson appeals his 126-month sentence following his guilty plea to possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) (2018). On appeal, Davidson challenges his classification as an armed career criminal, arguing that his prior North Carolina breaking and entering convictions did not qualify as violent felonies under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (2018). We affirm.

We review de novo whether a prior conviction qualifies as a violent felony under the ACCA. *United States v. Winston*, 850 F.3d 677, 683 (4th Cir. 2017). “The ACCA defines ‘violent felony’ to include, as relevant here, any offense that ‘is burglary.’” *United States v. Mungro*, 754 F.3d 267, 268 (4th Cir. 2014) (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2018)). To determine whether North Carolina breaking and entering qualifies as burglary, we apply the categorical approach, “focus[ing] solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case.” *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). The Supreme Court has defined generic burglary as “an unlawful or unprivileged entry into a building or other structure, with intent to commit a crime.” *Id.* (ellipsis and internal quotation marks omitted).

In *Mungro*, we held that North Carolina breaking and entering qualifies as a violent felony under the ACCA. 754 F.3d at 272. In doing so, we specifically rejected the arguments Davidson raises on appeal. *Id.* at 271-72. Davidson’s claim is therefore squarely foreclosed by *Mungro*.

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED