No. 20-7188

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IN THE SUPREME COURT OF THE UNITED STATES

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SEDRIC RASHAD MARION, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner's prior convictions for breaking and entering, in violation of North Carolina General Statute § 14-54 (2003 & 2006), constitute convictions for "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 821 Fed. Appx. 264.

## JURISDICTION

The judgment of the court of appeals was entered on September 18, 2020. The petition for a writ of certiorari was filed on February 12, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-3a.

1. On June 1, 2016, police officers in Rocky Mount, North Carolina stopped petitioner's car for speeding. Presentence Investigation Report (PSR) ¶ 6. During the stop, officers noticed an open container of alcohol beside the center console. Ibid. Officers removed petitioner from the car, conducted a search, and located a loaded .380-caliber handgun underneath the driver's seat. Ibid. They also found a matching holster inside the trunk. Ibid. The gun had been reported stolen. Ibid.

Petitioner was later arrested by federal officers. PSR ¶ 7. During the arrest, petitioner spontaneously stated that he had the handgun for protection. Ibid. Petitioner further admitted to stealing the handgun from an unattended guest room at a local motel. Ibid.

2. A federal grand jury indicted petitioner on one count of possessing a firearm as a felon, in violation of 18 U.S.C.

922(g)(1) and 924. Indictment 1. Petitioner pleaded guilty. PSR ¶ 3.

The default term of imprisonment for the offense of possessing a firearm as a felon is zero to 120 months. See 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." The ACCA defines a "violent felony" to include, inter alia, any crime punishable by more than one year that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. 924(e)(2)(B)(ii). Although the ACCA does not define "burglary," this Court in Taylor v. United States, 495 U.S. 575 (1990), construed the term to include "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Id. at 599.

Before sentencing in this case, the Probation Office prepared a presentence report stating that petitioner had eight prior convictions for breaking and entering under North Carolina General Statute § 14-54 (2003 & 2006). PSR ¶¶ 20, 21, 27. The Probation Office further determined that petitioner had at least three prior convictions that qualified as violent felonies under the ACCA and that he was thus subject to sentencing under the ACCA. PSR ¶¶ 64,

69. The Probation Office calculated petitioner's advisory guidelines sentencing range at 180 to 188 months. PSR ¶ 69.

At sentencing, petitioner objected to the ACCA classification, arguing that his prior North Carolina convictions for breaking and entering did not qualify as "violent felon[ies]" under the ACCA. Sent. Tr. 3-4. Petitioner's counsel acknowledged that the Fourth Circuit had previously rejected that argument, and that petitioner wanted to "preserve [his] objection." Id. at 4. The district court overruled the objection and adopted the Guidelines range calculations in the presentence report. Ibid. The court sentenced petitioner to 180 months of imprisonment. Id. at 12.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-3a. The court applied its earlier decision in United States v. Mungro, 754 F.3d 267 (4th Cir.), cert. denied, 574 U.S. 1036 (2014), which had determined that the North Carolina breaking-and-entering offense "sweeps no more broadly than the generic elements of burglary" and "therefore qualifies as an ACCA predicate offense under 18 U.S.C. § 924(e)(2)(B)(ii)." Pet. App. 2a (quoting Mungro, 754 F.3d at 272, and citing United States v. Dodge, 963 F.3d 379, 383-385 (4th Cir. 2020), cert. denied, 141 S. Ct. 1445 (2021)).

ARGUMENT

Petitioner contends (Pet. 7-20) that the court of appeals erred in interpreting North Carolina General Statute § 14-54 (2003 & 2006) to criminalize generic "burglary" under the ACCA. The court's unpublished decision in this case is correct and does not conflict with any decision of this Court or of another court of appeals. This Court has recently and repeatedly denied review of petitions for writs of certiorari presenting the same question. See Dodge v. United States, 141 S. Ct. 1445 (2021) (No. 20-6941); Davidson v. United States, 141 S. Ct. 332 (2020) (No. 19-8810); Edwards v. United States, 140 S. Ct. 1241 (2020) (No. 19-7417); Maham v. United States, 140 S. Ct. 944 (2020) (No. 19-6904); Street v. United States, 140 S. Ct. 176 (2019) (No. 18-9364); Alexis v. United States, 138 S. Ct. 1547 (2018) (No. 17-7270). The same result is warranted here.

1. The court of appeals correctly determined that a conviction under the North Carolina breaking-and-entering statute constitutes a conviction for "generic" burglary under a straightforward application of Taylor v. United States, 495 U.S. 575 (1990). Pet. App. 2a-3a. Taylor held that Congress intended "burglary" in the ACCA to have a "uniform definition" that encompasses any "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 580, 598. Taylor instructed courts to apply a

"categorical approach" to determine whether a prior conviction "substantially corresponds" to that definition, examining "the statutory definition[]" of the previous crime in order to determine whether it substantially corresponds to the "generic" form of burglary referenced in the ACCA. Id. at 600, 602.

Employing that approach, the court of appeals has correctly determined that North Carolina breaking-and-entering statute, which punishes the breaking or entering of "any building," N.C. Gen. Stat. § 14-54 (2003 & 2006), with the intent to commit a crime, "sweeps no more broadly" than Taylor's definition of ACCA "burglary," Pet. App. 2a (citation omitted), which reaches the unlawful or unprivileged entry into a "building or structure," Taylor, 495 U.S. at 599. The North Carolina statute defines a "'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." N.C. Gen. Stat. § 14-54(c) (2003 & 2006). As the court of appeals has previously observed, "North Carolina courts construe * * * [the] 'building' element in a manner that tracks generic burglary's 'building' element." United States v. Beatty, 702 Fed. Appx. 148, 150 (4th Cir. 2017).

The court of appeals also has previously differentiated between the North Carolina breaking-and-entering offense and state burglary statutes that more broadly prohibit "the breaking and

entering of vehicles, boats, aircrafts, and other watercrafts." Beatty, 702 Fed. Appx. at 150 n.2 (citing, e.g., Mathis v. United States, 136 S. Ct. 2243, 2250 (2016)). In doing so, the court explained that North Carolina has enacted a separate statute that punishes the "breaking and entering of vehicles, boats, aircrafts, and other watercrafts." Ibid. (citing N.C. Gen. Stat. § 14-56 (2016)). Reasoning that the breaking-and-entering statute at issue here, N.C. Gen. Stat. § 14-54 (2003 & 2006), accordingly does not itself reach those locations, the court determined that it "sweeps no broader than generic burglary's 'building' element." Beatty, 702 Fed. Appx. at 150 (citing Taylor, 495 U.S. at 598).

2. Petitioner nonetheless equates (Pet. 7-12) the North Carolina breaking-and-entering statute with the burglary statutes in Taylor and Mathis v. United States, which reached various nonpermanent or mobile structures. See Mathis, 136 S. Ct. at 2250 ("Iowa's statute * * * reaches * * * 'any building, structure, or land, water, or air vehicle.'") (brackets and citation omitted; emphasis in original); Taylor, 495 US. at 599 (addressing statutes that "included breaking and entering 'any booth or tent, or any boat or vessel, or railroad car.'") (citation omitted).

The court of appeals, however, has previously construed the term "building" in North Carolina's breaking-and-entering statute to exclude such nonpermanent or mobile locations. See Beatty, 702

Fed. Appx. at 150 n.2. In doing so, the court cited decisions from the North Carolina appellate courts explaining that mobile homes or trailers may qualify as "buildings" for purposes of the North Carolina breaking-and-entering statute only "if under the circumstances of their use and location at the time in question they have lost their character of mobility and have attained a character of permanence." State v. Bost, 286 S.E.2d 632, 635 (N.C. Ct. App. 1982); see also State v. Douglas, 282 S.E.2d 832, 834 (N.C. Ct. App. 1981) ("The items listed in [N.C. Gen. Stat. §] 14-54 [(1969)] denote the qualities of permanence and immobility.").

Petitioner disputes (Pet. 11) that construction of the term "building" in the North Carolina breaking-and-entering statute. But two of his cited decisions involved the unlawful entry of permanent structures. See Bost, 286 S.E.2d at 634 (trailer "was 'blocked up' and not characterized by mobility"); State v. Batts, 617 S.E.2d 724, 2005 WL 2128956, at *3 (N.C. Ct. App. 2005) (Tbl.) (trailer "was a permanent, locked storage facility"). They accordingly fail to support his argument that the North Carolina provision covers nonpermanent or mobile structures. In the third decision, the state intermediate appellate court interpreted the term "dwelling house" in a different North Carolina burglary statute (N.C. Gen. Stat. § 14-51 (1981)) to encompass "an occupied travel trailer" that contained the owner's "living quarters."

State v. Taylor, 428 S.E.2d 273, 274 (N.C. Ct. App. 1993). Even assuming that the term "building" in the separate North Carolina breaking-and-entering statute would be construed the same way, that statute would still track the elements of generic "burglary." In United States v. Stitt, 139 S. Ct. 399 (2018), this Court held that "the [ACCA] term 'burglary' includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." Id. at 403-404; see generally United States v. Evans, 924 F.3d 21, 27 (2d. Cir.) ("[E]ven 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.") (citing N.C. Gen. Stat. § 14-51 (2019)), cert. denied, 140 S. Ct. 505 (2019).

Petitioner further suggests (Pet. 8) that the North Carolina breaking-and-entering statute is overbroad because it extends to permanent "structures * * * that house property and no people." This Court has long held, however, that generic burglary includes any "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Taylor, 495 U.S. at 598 (emphasis added). Contrary to petitioner's suggestion (Pet. 9-10), this Court's decision in Stitt -- which, as noted above, held that generic burglary includes the burglary of nonpermanent or mobile structures that are "used or adapted for

overnight accommodation," 139 S. Ct. 407 -- did not narrow the scope of generic burglary with respect to permanent structures.

3. Petitioner alternatively contends (Pet. 16-20) that a breaking-and-entering offense under North Carolina General Statute § 14-54 (2003 & 2006) does not require the defendant's physical "entry" into the building and, therefore, sweeps more broadly than generic "burglary." That contention is not properly before the Court, and in any event lacks merit.

Petitioner did not press any argument regarding "entry" before the court of appeals. His brief instead advanced only the claim that the North Carolina breaking-and-entering statute is non-generic on the theory that it criminalizes the breaking or entering into vehicles that are unsuitable for use as dwellings. See Pet. C.A. Br. 4-9. Because this Court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), petitioner's new argument does not warrant this Court's consideration. See United States v. Williams, 504 U.S. 36, 41 (1992) (explaining that this Court's "traditional rule" "precludes a grant of certiorari" where "'the question presented was not pressed or passed upon below'") (citation omitted).

In addition, because petitioner failed to preserve his "entry" argument, any review would necessarily be for plain error. See Fed. R. Crim. P. 52(b). To establish reversible plain error, petitioner would have to demonstrate (1) error; (2) that is plain

or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. United States v. Olano, 507 U.S. 725, 732-736 (1993); see, e.g., Puckett v. United States, 556 U.S. 129, 135 (2009). Petitioner, however, cannot demonstrate any error, much less a "clear or obvious" error, Puckett, 556 U.S. at 135 -- i.e., an error so obvious under the law as it existed at the time of the relevant appellate proceedings that the court was "derelict in countenancing it, even absent the defendant's timely assistance in detecting it," United States v. Frady, 456 U.S. 152, 163 (1982); see Henderson v. United States, 568 U.S. 266, 269 (2013).

A state offense is generic burglary so long as it "substantially corresponds" to generic burglary, which has the "basic elements" of an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Taylor, 495 U.S. at 599, 602. This Court adapted that definition from a well-known treatise, id. at 598, which explained that an "entry" has occurred "if any part of the actor's person intruded, even momentarily, into the structure." 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 8.13(b), at 467 (1986). As the treatise explained, "intrusion" may be accomplished by using "a part of a hand in opening a window" or "part of a foot in kicking out a window." Ibid. This Court has further observed that generic "burglary" encompasses "at least the 'classic'

common-law definition" of burglary. Taylor, 495 U.S. at 593. "The common law * * * defined the 'entry' element * * * broadly." United States v. Brown, 957 F.3d 679, 684 (6th Cir. 2020), cert. denied, 141 S. Ct. 1286 (2021). "As for entry, any the least degree of it, with any part of the body, or with an instrument held in the hand [wa]s sufficient." Ibid. (quoting 4 William Blackstone, Commentaries on the Law of England 227 (4th ed. 1770)); see ibid. (noting subsequent case law limiting entry by instrument).

The North Carolina breaking-and-entering statute requires the defendant to "either 'br[eak]' or 'enter[]' the building with the requisite unlawful intent." State v. Myrick, 291 S.E.2d 577, 579 (N.C. 1982). Under North Carolina law, a "breaking" requires "an[] act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed." Id. at 580 (emphasis added; citations and internal quotation marks omitted); see also, e.g., State v. Jones, 157 S.E.2d 610, 611 (N.C. 1967) (per curiam) (breaking store window); State v. Lucas, 758 S.E.2d 672, 676-677 (N.C. Ct. App. 2014) (breaking home window); State v. Watkins, 720 S.E.2d 844, 849-850 (N.C. Ct. App. 2012) (same). That requirement "substantially corresponds" to the entry element of generic burglary. Taylor, 599 U.S. at 602.

Petitioner points to no decision from any court adopting the "entry" theory that he now advances, let alone holding that a conviction under a state burglary or breaking-and-entering statute is not a conviction for generic burglary on such a basis. Cf. Brown, 957 F.3d at 684-689 (rejecting similar argument, which was based on putative distinction between entry by instrument used only for breaking and entry by instrument used to commit felony). Petitioner's analogy (Pet. 19-20) to attempted burglary laws is inapposite because such laws may require only "an[] act amounting to more than mere preparation that tends but fails to effect a burglary." United States v. Martinez, 954 F.2d 1050, 1053 (5th Cir. 1992).

4. At all events, review is unwarranted because, although the court of appeals was obligated to construe the North Carolina breaking-and-entering statute in the context of applying the ACCA, its construction is fundamentally a question of state law. This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," and petitioner provides no reason to deviate from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see also, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004). Review is particularly unwarranted here because petitioner does not allege that the decision below conflicts with a decision from any other court of appeals

considering the North Carolina breaking-and-entering statute. To the contrary, the Ninth Circuit recently examined North Carolina General Statute § 14-54 and reached the same conclusion as the court below. See Mutee v. United States, 920 F.3d 624, 627-628 (9th Cir. 2019) (per curiam).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2021