No. 22-____

IN THE
Supreme Court of the United States

REGINALD ANDRE MOLETTE,
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

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

JENNIFER C. LEISTEN
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
jennifer_leisten@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Whether North Carolina breaking and entering categorically qualifies as generic burglary under 18 U.S.C. § 924(e)(2)(B)(ii)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY PROVISIONS

SENTENCING GUIDELINES

IN THE

Supreme Court of the United States

REGINALD ANDRE MOLETTE,
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

Petitioner Reginald Andre Molette respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's unpublished opinion is available at 2022 U.S. App. LEXIS 5060, 2022 WL 563256 (4th Cir. Feb. 24, 2022); *see also infra*, Pet. App. 1a.

LIST OF PRIOR PROCEEDINGS

(1) *United States v. Reginald Andre Molette*, District Court No. 7:15-CR-86-FL, Eastern District of North Carolina (final judgment entered March 26, 2018).

(2) *United States v. Reginald Andre Molette*, United States Court of Appeals for the Fourth Circuit, No. 18-4209 (decision issued February 24, 2022).

JURISDICTION

The Fourth Circuit issued its opinion on February 24, 2022. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(e)(1) of Title 18 of the United States Code provides:

> 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).

Subsection 924(e)(2)(B) further provides:

> [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

A. District Court Proceedings

On September 23, 2015, a federal grand jury in the Eastern District of North Carolina indicted the Petitioner, Reginald Andre Molette, on a single count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). (Fourth

Circuit Joint Appendix 16; hereinafter, "J.A."). Petitioner eventually pled guilty to the indictment under a plea agreement with the government. At sentencing, the district determined—over Petitioner's objection—that he qualified as an armed career criminal under the Armed Career Criminal Act ("ACCA") and sentenced him to 188 months of imprisonment and five years of supervised release. (J.A. 102-110). The court entered its judgment on March 26, 2018. (J.A. 13). Petitioner timely appealed to the United States Court of Appeals for the Fourth Circuit on April 3, 2018. (J.A. 111).

B. Court of Appeals Proceedings

On appeal to the Fourth Circuit, Petitioner argued, *inter alia*, that the district court erred by finding that his prior conviction for North Carolina breaking or entering qualified as a violent felony under the ACCA. The Fourth Circuit rejected that argument and affirmed the judgment of the district court. This petition followed.

THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner argued to the Fourth Circuit that the district court erred by sentencing him as an armed career criminal based on his prior conviction for North Carolina breaking or entering. The Court of Appeals rejected Petitioner's argument and affirmed the district court. Thus, the claim was properly presented and reviewed below and is appropriate for this Court's consideration.

REASONS FOR GRANTING THE PETITION

The ACCA has drastic consequences for criminal defendants. Although violations of the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), are normally subject to a maximum penalty of ten years of imprisonment and no mandatory minimum, the ACCA provides that defendants with three prior convictions for "violent felonies" must be sentenced to a term of at least fifteen years. 18 U.S.C. § 924(e)(1). A longer term of supervised release is authorized. 18 U.S.C. § 3583(b). And qualifying defendants are also subject to an increased offense level and criminal history category under the Guidelines. U.S.S.G. § 4B1.4(b),(c). Qualifying convictions include:

> 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.

18 U.S.C. § 924(e)(2)(B).

The ACCA's residual clause is unconstitutionally vague. *Johnson v. United States*, 576 U.S. 591, 606 (2015). Breaking or entering does not have "as an element the use, attempted use, or threatened use of physical force against the person of another," so it cannot satisfy the force clause. *See Johnson v. United States*, 559 U.S. 133, 140 (2010). The question remains only whether it qualifies under the enumerated-offense clause as generic "burglary."

To determine whether a prior conviction is a violent felony under the ACCA, courts apply the categorical approach. *Quarles v. United States*, 139 S. Ct. 1872 (2019). Under that approach, the court "focus[es] 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*, 579 U.S. 500, 504 (2016). The prior state conviction is a proper ACCA predicate only if it is defined more narrowly than, or has the same elements as, the generic federal crime. *Descamps v. United States*, 570 U.S. 254, 261 (2013). If it sweeps more broadly, it is not a predicate regardless whether the defendant actually committed the offense in its generic form. *Id.*

North Carolina defines breaking or entering as follows:

> (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.
>
> * * *
>
> (b) 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.

N.C. Gen. Stat. § 14-54.

A. The "building" element of North Carolina breaking or entering is overbroad because it reaches vehicles and structures that house only property and no people and thus does not present the necessary risk of violent confrontation to qualify as generic "burglary."

The touchstone of generic burglary's locational element is whether committing the offense in a particular vehicle or structure "present[s] a serious risk

of violence" to another person. *United States v. Stitt*, 139 S. Ct. 399, 407 (2018); *see Quarles*, 139 S. Ct. at 1879 ("Congress 'singled out burglary' because of its 'inherent potential for harm to persons.' ") (quoting *Taylor v. United States*, 495 U.S. 575, 588 (1990)); *James v. United States*, 550 U.S. 192, 203 (2007), *overruled by Johnson*, 576 U.S. 591 ("The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate."); *Taylor*, 495 U.S. at 588 ("The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.").

Illustrating this focus on the risk of "violent confrontation," the Missouri statute at issue in *Taylor* was "beyond the scope" of ACCA because the law "criminalized breaking and entering '*any* boat or vessel, or railroad car' " and thus included "ordinary boats and vessels, often at sea (and railroad cars often filled with cargo, not people)." *Stitt*, 139 S. Ct. at 407 (explaining that the burglary statute in *Taylor* was broader than generic burglary because it was not limited to "circumstances where burglary is likely to present a serious risk of violence"). The Iowa burglary statute in *Mathis* was similarly overbroad because it covered "ordinary vehicles" and other structures that were used "for the storage or safekeeping of anything of value." *Id.* Unlike these two statutes, the one at issue in *Stitt* was no broader than generic burglary because it was limited to burglaries of

vehicles or other structures "customarily used or adapted for overnight accommodation" and was therefore "more clearly focus[ed] upon circumstances where burglary is likely to present a serious risk of violence." *Id.*

North Carolina's breaking or entering statute suffers from the very same flaws that rendered those in *Taylor* and *Mathis* fatally overbroad. Like the Missouri breaking and entering statute in *Taylor*, North Carolina's covers "*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) (emphasis added), and "nowhere restrict[s] its coverage . . . [only] to vehicles or structures customarily used or adapted for overnight accommodations." *Stitt*, 139 S. Ct. at 407 (noting that the Missouri's statute's "use[] [of] the word 'any' " rendered it broader than generic burglary). And just like the Iowa statute in *Mathis*, which was overbroad for encompassing structures and vehicles used "for the storage or safekeeping of anything of value," *id.*, North Carolina's breaking or entering statute expressly covers vehicles or structures that are "designed to house or secure within [them] any activity or *property*," N.C. Gen. Stat. § 14-54(c) (emphasis added); *see State v. Bost*, 286 S.E.2d 632, 634 (N.C. Ct. App. 1982) (breaking into a storage trailer for tools and equipment on a construction site); *State v. Batts*, 617 S.E.2d 724, at *2-*3 (N.C. Ct. App. 2005) (breaking into a trailer used to transport musical equipment); *State v. Taylor*, 428 S.E.2d 273, 274 (N.C. Ct. App. 1993) (breaking into a travel trailer temporarily made "an area of repose").

Circuit courts have faithfully applied *Stitt*, *Mathis*, and *Taylor* to conclude that statutes that allow for conviction based on burglary of structures and vehicles that house only property and no people are categorically broader than generic burglary and are not violent felonies. *See United States v. Jones*, 951 F.3d 1138 (9th Cir. 2019) (focusing on risk of violent confrontation post-*Stitt*); *Greer v. United States*, 938 F.3d 766 (6th Cir. 2019) (same); *United States v. Sims*, 933 F.3d 1009 (8th Cir. 2019) (same); *United States v. Montgomery*, 974 F.3d 587 (5th Cir. 2020) (same)). This Court's review is warranted to bring the Fourth Circuit's decisions in line with this Court's precedent and decisions of the other federal courts of appeals.

B. The "entry" element of North Carolina breaking or entering is overbroad because an unprivileged entry is not required.

North Carolina breaking or entering is broader than generic burglary in another way: It can be completed without entry. In *Taylor*, this Court defined generic burglary as having "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598; *see Mathis*, 136 S. Ct. at 2248 (generic burglary consists of "unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime.") (quoting *Taylor*, 495 U.S. at 598); *accord Stitt*, 139 S. Ct. at 405 (same); *Quarles*, 139 S. Ct. at 1875, 1877 (same). If a statute permits conviction without entry, it cannot be a match for generic burglary. *See Descamps*, 570 U.S. at 277 ("Because generic unlawful entry is not an element, or an alternative element, of [California Penal Code Ann.] § 459, a conviction under that statute is never for generic burglary.").

But North Carolina breaking or entering can be completed by breaking alone. The plain text of Section 14-54(a) permits conviction on a finding of *either* breaking *or* entry. The North Carolina Supreme Court confirms that understanding: "[B]y the disjunctive language of [14-54(a)], the state meets its burden by offering substantial evidence that defendant either 'broke' or 'entered' the building with the requisite unlawful intent." *State v. Myrick*, 291 S.E.2d 577, 579 (N.C. 1982); *see also State v. Jones*, 157 S.E.2d 610, 611 (N.C. 1967) (per curiam) (breaking a window with intent to commit a felony "therein completes the offense even though the defendant is interrupted or otherwise abandons his purpose without actually entering the building"); *see also State v. Watkins*, 720 S.E.2d 844, 850 (N.C. Ct. App. 2012) (vacating first-degree burglary conviction and entering judgment on the lesser included offense of breaking or entering because the State presented evidence of breaking but not of entry); *State v. Lucas*, 758 S.E.2d 672, 678 (N.C. Ct. App. 2014) ("Although . . . the State failed to prove that either Defendant actually entered the home . . . the entry of judgment on felonious breaking or entering is appropriate.").

Although North Carolina's scheme is rare, it is not unique. Arkansas and Iowa also have statutes whose text can be satisfied by proof of breaking alone. *See* Ark. Stat. Ann. § 5-39-202(a) ("A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he or she breaks or enters into any [enumerated structure or vehicle]."); Iowa Code Ann. § 713.1 ("[O]r any person having such intent [to commit a felony, assault, or theft therein] who breaks an occupied structure, commits burglary."). These statutes have been deemed

categorically broader than burglary, albeit on other grounds. *See Mathis*, 136 S. Ct. at 2257 ("Because the elements of Iowa's burglary law are broader than those of generic burglary [by covering vehicles in addition to structures], Mathis's convictions under that law cannot give rise to an ACCA sentence."); *United States v. Livingston*, 442 F.3d 1082, 1087 (8th Cir. 2006) ("We hold that breaking or entering a vehicle for purposes of committing a theft under Arkansas law [§ 5-39-202] is not a violent felony for purposes of the ACCA.").

Courts considering attempted burglary statutes provide more guidance. Breaking, but not entering, is typically categorized as attempted burglary or attempted breaking and entering. *See, e.g., Commonwealth v. Cotto*, 752 N.E.2d 768, 772 (Mass. App. Ct. 2001) ("[A]ssume in the case at bar that the defendant had broken the window, but upon seeing [a witness], dropped the infernal device and ran. In this scenario, he may be found guilty of attempted breaking and entering as well as attempted arson, but not of arson or breaking and entering."). Indeed, the North Carolina Supreme Court has described breaking or entering in terms strikingly similar to attempt, finding that when defendants "opened the door[,] although [they] had not entered" the building, felonious breaking or entering "was complete upon the finding by the jury of the overt act and felonious intent which was amply supported by the evidence." *State v. Nichols*, 150 S.E.2d 21, 22 (N.C. 1996).

Attempted burglary is not a violent felony under the ACCA. This Court in *James*, 550 U.S. 192, explained that Florida attempted burglary "is not 'burglary'

because it does not meet the definition of burglary under ACCA that this Court set forth in *Taylor v. United States*." *James*, 550 U.S. at 1971.[1] This was so because Florida attempted burglary could be satisfied when a defendant committed an act toward commission of burglary but fell short of "entering or remaining in a structure or conveyance with the intent to commit an offense therein." *Id.*; Fla. Stat. §§ 810.02(1), 777.04(1); *see James*, 550 U.S. at 227 (Scalia, J., dissenting) ("the full extent of the risk that burglary poses—the entry into the home that makes burglary such a threat to the physical safety of its victim—is necessarily absent in attempted burglary, however 'attempt' is defined").

The Second, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, analyzing attempted burglary statutes, have held those statutes similarly do not qualify as enumerated burglary. *See United States v. Evans*, 924 F.3d 21, 24 (2d Cir. 2019) (New York attempted burglary "qualified as a violent felony only under ACCA's voided residual clause"); *United States v. Thomas*, 2 F.3d 79, 80 (4th Cir. 1993) (New Jersey's attempted burglary statute "does not contain the elements required for 'burglary' as that term is used in 924(e)"); *United States v. Martinez*, 954 F.2d 1050, 1053 (5th Cir. 1992) (Texas's attempted burglary statute "does not require that the offender enter (or remain in) a building or structure" and therefore cannot qualify as enumerated burglary); *Van Cannon v. United States*, 890 F.3d 656, 658 (7th Cir. 2018) ("Iowa attempted burglary was a residual-clause offense and no

[1] Although this Court ultimately held that the offense qualified as a violent felony under the residual clause, that holding was abrogated by *Johnson*, 576 U.S. at 606.

longer counted toward Van Cannon's ACCA total" following *Johnson*); *United States v. Smith*, 645 F.3d 998, 1003 (8th Cir. 2011) (Minnesota attempted burglary could only qualify as a violent felony under the residual clause because "[a]ttempted burglary is not an enumerated offense"); *United States v. Strahl*, 958 F.2d 980 (10th Cir. 1992) (Utah's attempted burglary statute did not qualify as enumerated burglary because the Tenth Circuit could "not conclude that Congress intended implicitly to include attempted burglary as a violent offense when it specified burglary as a violent felony under § 924(e)(2)(B)(ii)").

This Court and courts of appeals confirm that breaking without entry is not a qualifying violent felony under ACCA. This Court's consideration is warranted to resolve this conflict as well. For these reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

/s/ *Jennifer C. Leisten*
JENNIFER C. LEISTEN
ASSISTANT FEDERAL PUBLIC DEFENDER
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
jennifer_leisten@fd.org

MAY 25, 2022 *Counsel for Petitioner*