No. 22-_____

SUPREME COURT OF THE UNITED STATES

ISIAH PAUL MENDEZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Todd A. Smith
Smith Giles PLLC
110 South Maple Street
Graham, North Carolina 27253
NC Bar no 26758
(336) 222-7735
taslaw@triad.rr.com

Representing the Petitioner

I. QUESTION PRESENTED

WHETHER OR NOT THE NORTH CAROLINA CRIME OF BREAKING AND ENTERING (N.C. GEN STAT. §14-54), AS DEFINED BY THE NORTH CAROLINA SUPRME COURT, CAN BE UTILIZED AS A PREDICATE FOR FINDING A DEFENDANT SUCH AS MR. MENDEZ ACCOUNTABLE UNDER THE ARMED CAREER CRIMINAL ACT (18. U.S.C. §924(e)) AFTER CONSIDERING UNITED STATES V JOHNSON, 576 US 591(2015)., TAYLOR v. UNITED STATES, 495 US 13 (2005), AND THEIR PROGENY.

II. LIST OF PARTIES

PARTIES TO THE PROCEEDING WHERE MR. MENDEZ WAS FOUND TO BE AN ARMED CAREER OFFENDER ARE AS FOLLOWS:

A. MRS. **SANDRA HAIRSTON, ESQ.**, UNITED STATES ATTORNEY IN THE MIDDLE DISTRICT OF NORTH CAROLINA AS DELEGATED TO **MR. STEPHEN INMAN, ESQ.**, ASSISTANT UNITED STATES ATTORNEY IN THE MIDDLE DISTRICT OF NORTH CAROLINA
REPRESENTING THE GOVERNMENT/APPELLEE/RESPONDENT
101 SOUTH EDGEWORTH STREET – FOURTH FLOOR
GREENSBORO, NORTH CAROLINA 27401

B. **TODD. A SMITH** – REPRESENTING THE DEFENDANT/APPELLANT/PETITIONER
SMITH GILES PLLC
110 S. MAPLE STREET
GRAHAM, NC 27253

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V. PETITION FOR WRIT OF CERTIORARI

Isiah Mendez, an inmate currently incarcerated at USP Atwater, in Atwater, California, by and through counsel, respectfully petitions the Court to issue a writ of certiorari to review the Judgment of the Fourth Circuit Court of Appeals in this matter.

VI. PRIOR DECISIONS

The final judgment of the District Court was rendered in open Court when Mr. Mendez was sentenced on December 20, 2018, the Honorable Judge William Osteen, Jr. presiding, case no 1:18 CR 185-WO-1 (MDNC). A The written order and statement of reasons were issued on January 22. 2019, copies of which have been included in the appendix.

The final judgment of the Fourth Circuit Court of Appeals was issued on March 22, 2022 in an unpublished per curium opinion decided by Circuit Judges Diaz, Thacker and Richardson, a copy of which has been included in the appendix, case no 19-4050 (4th Cir.)

VII. JURISDICTIONAL STATEMENT

Mr. Mendez asserts that the Court has jurisdiction, at its discretion, to review his case pursuant to 28 U.S.C. §1254, Article III, Section Two of the United States Constitution and Rule 10 of the Rules of the Supreme Court. This

Petition is from a final decision of a United States Appellate Court regarding a conviction of a federal crime and has been timely filed by the Petitioner.

VII. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VIII. STAUTORY PROVISIONS INVOLVED

18 U.S.C. 924(e)(1) – Armed Career Criminal Act:

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).

IX. STATEMENT OF THE FACTS

On September 1, 2017 Kannapolis, North Carolina police officers responded to a "shots fired" call at the residential address of Kim Best. They found that an unknown person had shot into Mrs. Best's home and hit Mr. Mendez in the leg.

Mr. Mendez was 21 years old at the time and was sleeping on the couch when the incident occurred. After law enforcement arrived, they searched the house and found a .380 caliber pistol in the living room. A trace revealed that the firearm had crossed state lines and was originally purchased by Mrs. Best. After reviewing her social media posts, Mrs. Best admitted that she had bought the firearm to give to Mendez. Mr. Mendez also admitted that he possessed the firearm to law enforcement.

X. STATEMENT OF THE CASE

On August 9, 2018, Mr. Mendez entered a plea of guilty to possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. §922(g), pursuant to an indictment issued by a grand jury sitting in the Middle District of North Carolina.

A pre-sentence report was prepared by the probation office in the Middle District of North Carolina and promulgated to the parties. In the report, it was recommended that Mr. Mendez's sentence be enhanced, pursuant to 18 U.S.C. §924(e) (hereafter referred to as the Armed Career Criminal Act or ACCA) because he had three prior convictions for felony breaking and entering under North Carolina law (N.C. Gen. Stat. §14-54) that were adjudicated on different occasions. All three of these offenses occurred when he was either 16 or 17 years old.

Mr. Mendez objected to his designation as an armed career criminal, both at this juncture and before the District Court at sentencing, arguing that the North Carolina breaking and entering statute, when considering the statute from a categorical approach, was broader than the generic definition of burglary as set out in Taylor v United States, 495 U.S. 575, 110 S.Ct. 2143 (1990) decision and therefore should not have been used to enhance his sentence. In particular, Mendez argued that in North Carolina, the NC Supreme Court has clearly decided that a person can commit the breaking and entering offense without ever entering a building or staying within a building as required by the Taylor definition.

On December 20, 2018 the District Court, after finding that Mendez was qualified to be sentenced as an armed career criminal, sentenced him to 188 months in prison as punishment for this offense. This sentence is 68 months longer than the maximum sentence allowed under 18 U.S.C. §922(g) if Mendez had not qualified as an armed career offender. A copy of the judgment is included in the appendix.

Mr. Mendez appealed his sentence and again argued upon appeal that North Carolina law was very clear in that it allowed for a person to be convicted of breaking and entering by either breaking or entering and that entering by itself was not an essential element of the crime. In particular, Mendez cited multiple cases where the North Carolina Appellate and Supreme Court cases have relied on the

position that one can commit this offense without entering (and alternatively without breaking as well – cases listed in legal argument below and in attached brief in the appendix).

The Fourth Circuit filed a per curium opinion stating that the issue of whether or not the North Carolina breaking and entering statute sweeps more broadly than the Taylor definition had already been decided by the Court and referenced United States v Mungro, 754 F3d 267 (4th Cir. 2014) and United States v Dodge, 963 F3d 379 (4th Cir- 2020) and appeared to foreclose any attempts to further argue that breaking and entering lay outside the scope of the Taylor definition. The Court then ruled against Mr. Mendez and denied his request to remand his case for re-sentencing.

Mr. Mendez now again argues that the North Carolina breaking and entering statute is not a predicate felony for the ACCA because a person can violate the law without any entering into any building at all. The law clearly is broader than the Taylor definition because of this fact and therefore should not be used as a predicate offense for ACCA purposes.

XI. LEGAL ARGUMENT

The Armed Career Criminal Act ("ACCA") provides for severely enhanced penalties for people who have been convicted of 18 U.S.C. §922(g) if they have been previously convicted of three or more predicate offenses as defined under the

statute 18 U.S.C. §924(e). Among other penalties imposed by the statute, a defendant who qualifies for the enhancement has his or her minimum and maximum sentence under the law changed from 0-10 years (no enhancement) to 15 yrs. to life (with the enhancement).

Predicates for the armed career offender act include serious drug offenses (which are not important for this argument and therefore not further described here) and crimes of violence. After the watershed decision Johnson v United States, 576 US 591, 135 S. CT. 2551 (2015) struck down the residual clause of the ACCA statute because it was found to be unconstitutionally vague, many offenses that formerly were considered violent crime predicates for ACCA purposes are no longer considered predicates (ie fleeing to elude, United States v Barlow, 811 F3d 133 (2015), larceny from the person, Sackrider v United States, 2020 US Dist. WDNC, Statesville Division, Lexis 18459 - unpublished (2020), and shooting into an occupied dwelling United States v Al-Muwwakkil, 983 F3d 748 (2020)). However, the Fourth Circuit determined that the North Carolina breaking and entering statute was still a predicate offense because it is similar to the burglary requirement under the enumerated crimes clause which includes the crime of burglary, 18 U.S.C. §924(e)(2)(B)(ii) and United States v Mungro, 754 F3d 267 (4th Cir. 2014).

In Taylor v United States, 495 U.S. 575 (1990) the Supreme Court decided that a crime need not be called burglary to be considered burglary for ACCA

purposes. The Taylor case created a generic definition of burglary that was to be compared to each State's law at issue to determine whether or not the crime would be considered burglary for ACCA purposes. The generic definition that they defined was: a person must be convicted of a crime that required either entering a building without permission or staying within a building without permission, and an intent to commit a crime therein to qualify as burglary for ACCA purposes, Taylor.

It is also important to note that this issue is considered using a categorical approach, not a case specific approach, to determine whether or not the offense counts as a predicate Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254 (2005) and Descamps v. United States, 133 S. Ct. 2276, 570 U.S. 254 (2013).

The Supreme Court and the Circuit Courts have consistently upheld this scheme, finding that when a crime can be committed in a way that is broader than the generic Taylor definition of burglary it does not qualify as an ACCA predicate. Examples include Mathis v United States, 136 S Ct 2243, 579 U.S. 500, (2016) – Taylor approach does not include vehicles, only buildings, James v United States 550 US 192, 127 S.Ct. 1586 (2007) curtilage does not count – although Defendant lost on other grounds, and United States v Henriquez 757 F3d 144 (4th Cir. 2014) – Taylor definition does not cover boats and vehicles.

The North Carolina Courts have clearly stated over and over that a person does not have to enter a building or stay within a building to be convicted of the

crime of breaking and entering. Cases directly on point include North Carolina v Oneal , 77 NC App 600, 335 SE2d 920 (1985) finding no error when instructions in a criminal case allowed conviction with no entering and quoting the cases of North Carolina v Barnette, 41 NC App 171, 254 SE2d 199 (1979)stating that no entry is necessary and North Carolina v Jones, 272 NC 108, 157 SE2d 610 (1967) stating that no breaking is required. Also included in cases that are directly on point is North Carolina v Wooten, 1 NC App 240, 161 SE2d 59 (1968) where conviction occurred when glass was broken but no evidence of entry occurred. The rule has been expressed a multitude of times in other cases including North Carolina v Burgess, 1 NC App 104, 160 SE2d 110 (1968).

When reviewing the North Carolina case law it appears to be clear that the crime of breaking and entering can be committed without any entry into a building which is a key element of the generic Taylor definition. The State Court appears to have made this ruling consistently throughout the years on many occasions.

In its brief, the Government tried to distinguish the rule by stating that the breaking is essentially an entry. They have produced cases showing that breaking the plane of a building is entering. While that is true, those cases do not get to the point at issue here. None of those cases appear to say that the entry is required, only that there was entry on those occasions. To date, no cases in North Carolina

Courts have been found by counsel or by opposing counsel stating that entry is required for conviction of this offense.

The Mungro and Dodge cases show that the breaking and entering predicate has been challenged many times. However, it does not appear that the challenges were because the crime could be committed without any entering at all, which is Mr. Mendez's argument.

XII. REASONS TO GRANT THE WRIT

1. A WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE, AS STATED IN RULE 10(c) OF THE RULES OF THE SUPREME COURT, A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTON OF FEDERAL LAW THAT CONFLICTS WITH RELEVANT DECISIONS OF THE COURT.

It is clear from the cases such as Mathis v United States, 136 S Ct 2243, 579 U.S. 500 (2016) and James v United States 550 US 192, 127 S.Ct. 1586 (2007) that the Court has consistently upheld the categorical approach as decided in Taylor v United States, 495 U.S. 575, 110 S.CT. 2143 (1990) to determine whether or not a State offense qualifies as a burglary predicate under the Armed Career Criminal Act. If the crime can be committed in a way that is broader than the generic Taylor definition, then it can not serve as a predicate.

It is also clear when reading the State cases that North Carolina's breaking and entering statute does not require a defendant to enter into any type of structure to be found guilty of the offense. This is directly laid out in cases such as North

Carolina v Oneal , 77 NC App 600, 335 SE2d 920 (1985), North Carolina v Barnette, 41 NC App 171, 254 SE2d 199 (1979), North Carolina v Jones, 272 NC 108, 157 SE2d 610 (1967) and North Carolina v Wooten, 1 NC App 240, 161 SE2d 110 (1968) as well as the general rule being set in many more cases that the crime only requires breaking **or** entering, but not both.

Because the State law is broader than the generic definition of burglary the Defendant respectfully argues the Court of Appeals has decided a case in contradiction to the well established laws of the Supreme Court.

2. A WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE, AS STATED IN RULE 10(a) OF THE RULES OF THE SUPREME COURT, A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT CONFLICTS WITH A DECSION OF A STATE COURT OF LAST RESORT.

Although Mr. Mendez's case was decided with only a short per curium opinion attached, Mendez argues that the Circuit Court has tried to foreclose the matter of whether or not North Carolina breaking and entering is a predicate for the Armed Career Criminal Act without considering his argument that it can be committed in a way that is broader than the Taylor definition, specifically by breaking without entering a structure. He further argues that this is in contradiction to the law that has clearly been set out by the North Carolina Supreme Court which is the Court of last resort in the State. That Court has stated

that the offense can be committed without entering which is in contradiction of the cases cited by the Circuit Court in Mendez's opinion.

3. A WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE A LARGE NUMBER OF DEFENDANTS HAVE HAD THEIR SENTENCES UNLAWFULLY ENHANCED IN A SEVERE MANNER AND RECTIFYING THIS SITUATION WILL PROMOTE RESPECT FOR THE LAW AND WILL UPHOLD THE ENDS OF JUSTICE.

According to a report created by the United States Sentencing Commission, in the year 2019 (which is the last year with available data when the report was made) 11 of the 94 Federal Judicial Districts accounted for 50.5% of all defendants sentenced after being enhanced by the Armed Career Criminal Act, U.S. Sentencing Commission – March 2021, Federal Armed Career Criminal, Prevalence, Patterns and Pathways, Charles Breyer, Acting Chair, www.ussc.gov. The Middle District of North Carolina was one of those eleven Districts. In 2019, 42.6% of defendants enhanced by the Act had at least one predicate offense for burglary (nationally) Id.

While it is difficult to state the exact number of Defendants who would be affected by agreeing with the State of North Carolina that the definition of breaking and entering is broader than the Taylor definition, it is not a stretch to say it would be a large number of people who have had at least five years (and many likely much more) to their sentences. It is also important to note that breaking and

entering is one of the predicate crimes that is used more often to enhance people for ACCA purposes than other offenses.

As an example, in this case it appears that Mr. Mendez, given no difference other than being enhanced as an Armed Career Criminal due to his breaking and entering charges, would have had a recommended guideline range of 51-63 months instead of the 180 months to life imposed by the Court (his actual sentence was 188 mos.) Mendez had no other predicate offenses, other than breaking and entering, with which to enhance his sentence.

4. A WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRES THAT ALL DEFENDANTS RECEIVE DUE PROCESS WHEN CHARGED WITH A CRIMIANL OFFENSE.

Mr. Mendez respectfully argues that the way that the Circuit Court handled his case has deprived him of his due process in that they did not consider his argument that the North Carolina breaking and entering statute is broader than the Taylor definition of generic burglary, but merely cited other cases that did not directly get to his point. Mendez argues that it is the Circuit Court's duty to analyze his argument and reach a proper decision in the case , which he argues is that the North Carolina statute should not be a predicate offense for ACCA purposes.

XIII. CONCLUSION

For the reasons stated above, Mr. Mendez prays the Court to

issue a writ of certiorari to review his case.

Respectfully submitted this 20th day of June, 2022.

Todd A. Smith
Smith Giles PLLC
110 South Maple Street
Graham, North Carolina 27253
NC Bar No. 26758
(336) 222-7735
taslaw@triad.rr.com

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CERTIFICATE OF SERVICE

I, Todd A. Smith, hereby certify that, on today's date, I served a copy of the attached Petition for Writ of Certiorari and related appendix upon the parties listed below at the addresses listed below. Such service was effectuated by placing a copy of such Petition and appendix in a plain white envelope and placing that envelope in the custody of the United States Postal Service, first class postage pre-paid with directions to send it to the following:

Sandra Hairston, Esq.
Attention: Stephen Inman, Esq.
United States Attorney – Middle District of North Carolina
101 South Edgeworth Street – Fourth Floor
Greensboro, North Carolina 27401

Solicitor General of the United States
Department of Justice – Room 5614
95 Pennsylvania Avenue NW
Washington, District of Columbia 20530

This is the 20th day of June, 2022.

Todd A. Smith
Smith Giles PLLC
110 South Maple Street
Graham, North Carolina 27253
NC Bar No. 26758
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RULE 33 CERTIFICATION

I, Todd A. Smith, hereby certify that the attached Petition for Writ of Certiorari, not including the attached appendix consists of less than 9000 words and less than forty pages, being 3866 words according to the counter on the word processor, and being 21 pages in length.

This is the 20th day of June, 2022.

Todd A. Smith
Smith Giles PLLC
110 South Maple Street
Graham, North Carolina 27253
NC Bar No. 26758
(336) 222-7735