

No. 22- _____

SUPREME COURT OF THE UNITED STATES

ISIAH PAUL MENDEZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

APPENDIX

United States District Court Middle District of North Carolina

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

JAN 22 2019

v.

ISIAH PAUL MENDEZ

Case Number: 1:18-CR-00185-1

USM Number: 65076-056

Todd Allen Smith

Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count 1.
☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:922(g)(1) and 924(a)(2)	Possession of a Firearm by a Convicted Felon	09/01/2017	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the economic circumstances.

December 20, 2018
 Date of Imposition of Judgment

William L. Osteen, Jr.
 Signature of Judge

William L. Osteen, Jr., United States District Judge

Name & Title of Judge

JAN 22 2019

Date

DEFENDANT: ISIAH PAUL MENDEZ
CASE NUMBER: 1:18-CR-00185-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **188 months**.

☒ The court makes the following recommendations to the Bureau of Prisons: that the defendant be designated to a facility as close as possible to his home in Cabarrus County, North Carolina; that the defendant be designated to a facility where he may participate in an intensive substance abuse treatment program; where he may receive a psychological evaluation and any recommended treatment while in custody of the Bureau of Prisons; and further, that the defendant be designated to a facility where he may participate in such educational and vocational training opportunities that may be reasonably available.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at _____ am/pm on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 pm on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____

_____, with a certified copy of this judgment.

UNITED STATES MARSHAL

BY

DEPUTY UNITED STATES MARSHAL

(23)

DEFENDANT: ISIAH PAUL MENDEZ
CASE NUMBER: 1:18-CR-00185-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: four (4) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

24

DEFENDANT: ISIAH PAUL MENDEZ
CASE NUMBER: 1:18-CR-00185-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

(25)

DEFENDANT: ISIAH PAUL MENDEZ
CASE NUMBER: 1:18-CR-00185-1

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall cooperatively participate in a mental health treatment program, which may include inpatient treatment, and pay for those treatment services, as directed by the probation officer.

The defendant shall submit to substance abuse testing, at any time, as directed by the probation officer. The defendant shall cooperatively participate in a substance abuse treatment program, which may include drug testing and inpatient/residential treatment, and pay for treatment services, as directed by the probation officer. During the course of treatment, the defendant shall abstain from the use of alcoholic beverages.

The defendant shall submit his person, residence, office, vehicle, or any property under his control to a warrantless search. Such a search shall be conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a search may be grounds for revocation; the defendant shall warn any residents that the premises may be subject to searches.

The defendant shall not associate with or be in the company of any gang member/security threat group member, including but not limited to the Bloods. The defendant shall not frequent any locations where gangs/security threat groups congregate or meet. The defendant shall not wear, display, use or possess any clothing or accessories which have any gang or security threat group significance.

26

DEFENDANT: ISIAH PAUL MENDEZ
CASE NUMBER: 1:18-CR-00185-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00		\$0.00	\$0.00

☐ The determination of restitution is deferred until _____ An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement \$

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived pursuant to 18 U.S.C. Section 3612(f)(3) for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

27

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ISIAH PAUL MENDEZ
CASE NUMBER: 1:18-CR-00185-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$100.00 due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g. weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years),
to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g. weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years),
to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment.
The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk of Court, United States District Court for the Middle District of North Carolina, 324 West Market Street, Greensboro, NC 27401-2544, unless otherwise directed by the court, the probation officer, or the United States Attorney. Nothing herein shall prohibit the United States Attorney from pursuing collection of outstanding criminal monetary penalties.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names, Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

DEFENDANT: ISIAH PAUL MENDEZ
CASE NUMBER: 1:18CR185-1
DISTRICT: Middle District of North Carolina

STATEMENT OF REASONS

(Not for Public Disclosure)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony and Class A misdemeanor cases.

I. COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

- A. ☒ The court adopts the presentence investigation report without change.
- B. ☐ The court adopts the presentence investigation report with the following changes. (Use Section VIII if necessary)
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report.)
1. ☐ Chapter Two of the United States Sentencing Commission Guidelines Manual determinations by court: (briefly summarize the changes, including changes to base offense level, or specific offense characteristics)
 2. ☐ Chapter Three of the United States Sentencing Commission Guidelines Manual determinations by court: (briefly summarize the changes, including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility)
 3. ☐ Chapter Four of the United States Sentencing Commission Guidelines Manual determinations by court: (briefly summarize the changes, including changes to criminal history category or scores, career offender status, or criminal livelihood determinations)
 4. ☐ Additional Comments or Findings: (include comments or factual findings concerning any information in the presentence report, including information that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions; any other rulings on disputed portions of the presentence investigation report; identification of those portions of the report in dispute but for which a court determination is unnecessary because the matter will not affect sentencing or the court will not consider it)
- C. ☐ The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.
Applicable Sentencing Guideline: (if more than one guideline applies, list the guideline producing the highest offense level) _____

II. COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply)

- A. ☒ One or more counts of conviction carry a mandatory minimum term of imprisonment and the sentence imposed is at or above the applicable mandatory minimum term.
- B. ☐ One or more counts of conviction carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum term does not apply based on:
- ☐ findings of fact in this case: (Specify)
 - ☐ substantial assistance (18 U.S.C. § 3553(e))
 - ☐ the statutory safety valve (18 U.S.C. § 3553(f))
- C. ☐ No count of conviction carries a mandatory minimum sentence.

III. COURT DETERMINATION OF GUIDELINE RANGE: (BEFORE DEPARTURES OR VARIANCES)

Total Offense Level: 31
Criminal History Category: VI
Guideline Range: (after application of §5G1.1 and §5G1.2) 188 to 235 months
Supervised Release Range: 2 to 5 years
Fine Range: \$ 30,000 to \$ 250,000

- ☒ Fine waived or below the guideline range because of inability to pay.

DEFENDANT: ISIAH PAUL MENDEZ
CASE NUMBER: 1:18CR185-1
DISTRICT: Middle District of North Carolina

STATEMENT OF REASONS

IV. GUIDELINE SENTENCING DETERMINATION *(Check all that apply)*

- A. ☐ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range does not exceed 24 months.
- B. ☒ The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range exceeds 24 months, and the specific sentence is imposed for these reasons: *(Use Section VIII if necessary)*
See section VIII
- C. ☐ The court departs from the guideline range for one or more reasons provided in the Guidelines Manual.
(Also complete Section V.)
- D. ☐ The court imposed a sentence otherwise outside the sentencing guideline system (i.e., a variance). *(Also complete Section VI)*

V. DEPARTURES PURSUANT TO THE GUIDELINES MANUAL *(If applicable)*A. The sentence imposed departs: *(Check only one)*

- ☐ above the guideline range
☐ below the guideline range

B. Motion for departure before the court pursuant to: *(Check all that apply and specify reason(s) in sections C. and D.)*

1. **Plea Agreement**
☐ binding plea agreement for departure accepted by the court
☐ plea agreement for departure, which the court finds to be reasonable
☐ plea agreement that states that the government will not oppose a defense departure motion.
2. **Motion Not Addressed in a Plea Agreement**
☐ government motion for departure
☐ defense motion for departure to which the government did not object
☐ defense motion for departure to which the government objected
☐ joint motion by both parties
3. **Other**
☐ Other than a plea agreement or motion by the parties for departure

C. Reasons for departure: *(Check all that apply)*

- | | | |
|---|--|---|
| <input type="checkbox"/> 4A1.3 Criminal History Inadequacy | <input type="checkbox"/> 5K2.1 Death | <input type="checkbox"/> 5K2.12 Coercion and Duress |
| <input type="checkbox"/> 5H1.1 Age | <input type="checkbox"/> 5K2.2 Physical Injury | <input type="checkbox"/> 5K2.13 Diminished Capacity |
| <input type="checkbox"/> 5H1.2 Education and Vocational Skills | <input type="checkbox"/> 5K2.3 Extreme Psychological Injury | <input type="checkbox"/> 5K2.14 Public Welfare |
| <input type="checkbox"/> 5H1.3 Mental and Emotional Condition | <input type="checkbox"/> 5K2.4 Abduction or Unlawful Restraint | <input type="checkbox"/> 5K2.16 Voluntary Disclosure of Offense |
| <input type="checkbox"/> 5H1.4 Physical Condition | <input type="checkbox"/> 5K2.5 Property Damage or Loss | <input type="checkbox"/> 5K2.17 High-Capacity, Semiautomatic Weapon |
| <input type="checkbox"/> 5H1.5 Employment Record | <input type="checkbox"/> 5K2.6 Weapon | <input type="checkbox"/> 5K2.18 Violent Street Gang |
| <input type="checkbox"/> 5H1.6 Family Ties and Responsibilities | <input type="checkbox"/> 5K2.7 Disruption of Government Function | <input type="checkbox"/> 5K2.20 Aberrant Behavior |
| <input type="checkbox"/> 5H1.11 Military Service | <input type="checkbox"/> 5K2.8 Extreme Conduct | <input type="checkbox"/> 5K2.21 Dismissed and Uncharged Conduct |
| <input type="checkbox"/> 5H1.11 Charitable Service/Good Works | <input type="checkbox"/> 5K2.9 Criminal Purpose | <input type="checkbox"/> 5K2.22 Sex Offender Characteristics |
| <input type="checkbox"/> 5K1.1 Substantial Assistance | <input type="checkbox"/> 5K2.10 Victim's Conduct | <input type="checkbox"/> 5K2.23 Discharged Terms of Imprisonment |
| <input type="checkbox"/> 5K2.0 Aggravating/Mitigating Circumstances | <input type="checkbox"/> 5K2.11 Lesser Harm | <input type="checkbox"/> 5K2.24 Unauthorized Insignia |
| | | <input type="checkbox"/> 5K3.1 Early Disposition Program (EDP) |

- ☐ Other Guideline Reason(s) for Departure, to include departures pursuant to the commentary in the Guidelines Manual: *(see "List of Departure Provisions" following the Index in the Guidelines Manual.) (Please specify)*

D. State the basis for the departure. *(Use Section VIII if necessary)*

DEFENDANT: ISIAH PAUL MENDEZ
CASE NUMBER: 1:18CR185-1
DISTRICT: Middle District of North Carolina

STATEMENT OF REASONS

VI. COURT DETERMINATION FOR A VARIANCE (If applicable)

A. The sentence imposed is: (Check only one)

- ☐ above the guideline range
☐ below the guideline range

B. Motion for a variance before the court pursuant to: (Check all that apply and specify reason(s) in sections C and D)

1. **Plea Agreement**
☐ binding plea agreement for a variance accepted by the court
☐ plea agreement for a variance, which the court finds to be reasonable
☐ plea agreement that states that the government will not oppose a defense motion for a variance
2. **Motion Not Addressed in a Plea Agreement**
☐ government motion for a variance
☐ defense motion for a variance to which the government did not object
☐ defense motion for a variance to which the government objected
☐ joint motion by both parties
3. **Other**
☐ Other than a plea agreement or motion by the parties for a variance

C. 18 U.S.C. § 3553(a) and other reason(s) for a variance (Check all that apply)

- ☐ The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1)
☐ Mens Rea ☐ Extreme Conduct ☐ Dismissed/Uncharged Conduct
☐ Role in the Offense ☐ Victim Impact
☐ General Aggravating or Mitigating Factors (Specify) _____
- ☐ The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
☐ Aberrant Behavior ☐ Lack of Youthful Guidance
☐ Age ☐ Mental and Emotional Condition
☐ Charitable Service/Good Works ☐ Military Service
☐ Community Ties ☐ Non-Violent Offender
☐ Diminished Capacity ☐ Physical Condition
☐ Drug or Alcohol Dependence ☐ Pre-sentence Rehabilitation
☐ Employment Record ☐ Remorse/Lack of Remorse
☐ Family Ties and Responsibilities ☐ Other: (Specify) _____
- ☐ Issues with Criminal History: (Specify) _____
- ☐ To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
- ☐ To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
- ☐ To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
- ☐ To provide the defendant with needed educational or vocational training (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with medical care (18 U.S.C. § 3553(a)(2)(D))
- ☐ To provide the defendant with other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
- ☐ To avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6)) (Specify in section D)
- ☐ To provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))
- ☐ Acceptance of Responsibility ☐ Conduct Pre-trial/On Bond ☐ Cooperation Without Government Motion for Departure
- ☐ Early Plea Agreement ☐ Global Plea Agreement ☐ Waiver of Appeal
- ☐ Time Served (not counted in sentence) ☐ Waiver of Indictment
- ☐ Policy Disagreement with the Guidelines (Kimrough v. U.S., 552 U.S. 85 (2007): (Specify) _____
- ☐ Other: (Specify) _____

D. State the basis for a variance. (Use Section VIII if necessary)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,

v.

ISIAH MENDEZ,

Defendant.

1:18-CR-185-1

OBJECTIONS TO PRE SENTENCE REPORT

Mr. Mendez, by and through his undersigned counsel, COMES NOW and offers the following objections to his draft pre-sentence report in the above styled case,

GUIDELINES RECOMMENDATION

Mr. Mendez objects to the following guideline recommendations in his draft pre-sentence report:

1. He objects to the two level enhancement listed in paragraph 20 for obstruction of justice.

2. He objects to the four level enhancement in paragraph 17 for use of firearm in relation to another crime.

3. He objects to the designation as an armed career offender. Specifically, he objects to the breaking and entering charges listed in paragraphs 28, 29, 32, and 34 being used as predicate offenses to enhance him as an armed career offender.

Without the abovementioned enhancements Mr. Mendez believes that his proper guideline computation is offense level 12 and

criminal history category VI. This computation would place him in a recommended guideline range of 30-37 months of active incarceration as the active portion of his sentence.

FACTUAL OBJECTIONS

1. Mr. Mendez states that he did not obstruct justice as detailed in paragraph 11.

2. Mr. Mendez denies any involvement in the use of a firearm In connection with another offense.

Respectfully submitted this 5th day of November, 2018.

/s/ Todd A. Smith
Representing the Defendant
110-B South Maple Street
Graham, North Carolina 27253
(336) 222-7735
taslaw@triad.rr.com
NC Bar no. 26758

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,

v.

ISIAH MENDEZ,

Defendant.

1:18-CR-185-1

CERTIFICATE OF SERVICE

I, Todd A. Smith, hereby certify that I served a copy of the attached "Objections to Pre Sentence Report" upon Stephen Inman, who is the Assistant United States Attorney in the Middle District of North Carolina who has been assigned to this case. Such service was effectuated by electronic mail through the electronic case filing system that has been put in place by the Court for such purposes.

This is the 5th day of November, 2018.

/s/ Todd A. Smith
Representing the Defendant
110-B South Maple Street
Graham, North Carolina 27253
(336) 222-7735
taslaw@triad.rr.com
NC Bar no. 26758

(34)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,

v.

ISIAH PAUL MENDEZ,

Defendant.

1:18-CR-185-1

POSITION WITH REGARD TO PREDICATES FOR ARMED CAREER CRIMINAL ACT:
WHETHER OR NOT NORTH CAROLINA BREAKING AND ENTERING IS A "VIOLENT
FELONY" FOR PURPOSES OF ARMED CAREER CRIMINAL ACT

It is the position of the Defendant that convictions for felony breaking and entering (N.C. Gen. Stat. §14-54 and common law) in North Carolina should not be predicates for enhancement under the Armed Career Criminal Act (hereafter "ACCA"), codified at 18 U.S.C. §924(e) when applying the categorical approach to those cases.

While this matter has been considered before by the Courts, in many cases including Taylor v United States, 495 U.S. 575 (1990), Descamps v. United States 133 S. Ct 2276 (2013) and United States v Mungro, 754 F3d 267 (4th Cir. 2014), the Defendant argues that, using the categorical approach defined by the Court, the North Carolina breaking and entering statute is broader than the generic burglary definition promulgated by the Supreme Court and therefore should not be a predicate under the ACCA. In particular, the Defendant states that a person in North

Carolina who breaks a building, but does not enter, for example by throwing a brick through a window to determine whether or not the building has an alarm device, can be convicted of breaking and entering in North Carolina even though he or she has not met the elements defined by the Court for generic burglary.

The ACCA as set out in 18 U.S.C. §924(e), enhances the sentence of a person who has been convicted of illegal possession of a firearm to a minimum sentence of fifteen years when he or she has been convicted of three predicate offenses. Those predicate offenses include violent felonies and serious drug offenses. Subsection 18 U.S.C. §924(e)(2)(B)(ii) of the Act defines violent felonies for predicate purposes and expressly includes burglary.

In Taylor v United States, 495 US 575 (1990) and subsequent cases, the Court has defined how to determine when a breaking and entering charge from one of the several states qualifies as a burglary for ACCA predicate purposes. The test that the Court created includes a definition of generic burglary. The Court then compares the defined generic burglary with the State's version of breaking and entering to determine whether or not they are substantially similar. If they are substantially similar, then the offense qualifies as burglary for ACCA purposes. This categorical approach focuses on the offense itself and not on the underlying actions of the Defendant in the particular case.

In Descamps v United States, 133 S. Ct 22796 (2003) the Court gave us a clear definition of generic burglary that included the following elements: 1. unlawful or unprivileged entry, or remaining inside 2. a building or structure 3. with the intent to commit a crime therein.

In Mungro v. United States, 754 F3d 267 (4th Cir. 2014), the Defendant argued that North Carolina's breaking and entering statute was broader than the definition allowed by the Court in Descamps. In the Mungro case, the Defendant argued that, based on the North Carolina statute itself, a person could enter a place lawfully and still be found guilty of breaking and entering. The North Carolina statute was therefore broader than the generic version of burglary and therefore the crime could not be a ACCA predicate.

While the Court in that case did not agree with Mr. Mungro, it did lay out an issue that is important for this matter. In its opinion the Court referred to United States v Aparicio-Soria, 740 F3d 152 (4th Cir 2014)(en banc) which stands for the proposition that the Court should use the plain language of a State's statutes and the opinions of its highest Courts to determine when a crime meets the definition of generic burglary under the Taylor standard.

In North Carolina, a person who breaks but does not enter a building can be convicted of felony breaking and entering. Only

breaking or entering is required, State v. O'Neal, 77 NC App 600, emphasis added, (1985). In State v. Wooten, 1 NC App 240 (1968) the Court found a person guilty of breaking and entering when he broke a station window with intent to commit a felony but was interrupted before any entry was made into the station thereby showing that being in a structure or remaining in a structure is not required under N.C. Gen. Stat 14-54, as it is under the generic definition of burglary required by the Courts. This issue has been heard and settled in many case in North Carolina over the years, See State v Burgess, 1 NC App 104 (1968) and State v Jones, 272 NC 108 (1967).

When applying the categorical test laid out in Taylor with the definition set out in Descamps, the Defendant argues that the North Carolina breaking and entering statute at N.C. Gen Stat 14-54 should not be a predicate felony for ACCA purposes because it can be committed without committing the elements of generic burglary as defined by the Courts. When considering this equation the Defendant has looked at settled State law in both the Statute and under the Court's interpretations as required in Aparicio-Soria.

Therefore the Defendant prays the Court to find that he is not an armed career criminal in the case at hand.

30

Respectfully submitted this 17th day of December, 2018.

/s/ Todd A. Smith
Representing the Defendant
110-B South Maple Street
Graham, North Carolina 27253
(336) 222-7735
taslaw@triad.rr.com
NC Bar no. 26758

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,

v.

ISIAH PAUL MENDEZ,

Defendant.

1:18-CR-185-1

CERTIFICATE OF SERVICE

I, Todd A. Smith, hereby certify that I served a copy of the attached "Position With Regard To Predicates For Armed Career Criminal Act: Whether Or Not North Carolina Breaking And Entering Is A "Violent Felony" For Purposes Of Armed Career Criminal Act" upon Stephen Inman, who is the Assistant United States Attorney in the Middle District of North Carolina who has been assigned to this case. Such service was effectuated by electronic mail through the electronic case filing system that has been put in place by the Court for such purposes.

This is the 17th day of December, 2018.

/s/ Todd A. Smith
Representing the Defendant
110-B South Maple Street
Graham, North Carolina 27253
(336) 222-7735
taslaw@triad.rr.com
NC Bar no. 26758

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA :

v. :

ISIAH PAUL MENDEZ :

1:18CR185-1

FILED UNDER SEAL

POSITION PAPER OF THE UNITED STATES
REGARDING SENTENCING FACTORS

NOW COMES the United States of America, by and through Matthew G.T. Martin, United States Attorney for the Middle District of North Carolina, pursuant to LCrR32.2(d), and files this Position Paper of the United States Regarding Sentencing Factors solely because the defendant, Isiah Paul Mendez ("Mendez"), filed a position paper.

A. Mendez's claim is late.

Probation issued the draft PSR on October 22, 2018. Mendez should have filed a position paper on or before November 12. See LCrR32.2(d) (setting the time for filing of position papers as "[w]ithin 21 calendar days after disclosure of the draft [PSR]." Instead, he filed one three days before his December 20, 2018 sentencing. He claims that North Carolina breaking or entering (N.C. Gen. Stat. § 14-54) ("B&E") is not a violent felony under the Armed Career

(41)

Criminal Act (ACCA), because that crime cannot satisfy the categorical approach. Def's Position Paper at 1.

B. Mendez's claim is contrary to Fourth Circuit law.

The black-letter law of this Circuit for more than 25 years—reaffirmed many times in recent years—holds that North Carolina B&E is an ACCA violent felony. The Fourth Circuit decided this by published opinion in *United States v. Bowden*, 975 F.2d 1080, 1085 (4th Cir. 1992), soon after the watershed case of *Taylor v. United States*, 495 U.S. 575, 598 (1990). Many defendants have asked the Fourth Circuit to overrule *Bowden*; they have all failed.

This is true for the periods before and after all of the seminal cases that Mendez cites (see Def.'s Position Paper at [1] & [3]) in his position paper. See *United States v. Tony Lee Thompson*, 421 F.3d 278, 284 (4th Cir. 2005) (N.C. Gen. Stat. § 14-54, constitutes 'generic burglary'); *United States v. Michael Jerome Thompson*, 588 F.3d 197, 202 (4th Cir. 2009) (same); *United States v. Carr*, 592 F.3d 636, 638 (4th Cir. 2010) (same); *United States v. McNatt*, 727 F. App'x 68, 69 (4th Cir. 2018) (same). That conclusion is the same whether the issue is the "enter" element of North Carolina B&E, see *Bowden*, 975 F.2d at 1084, and *United States v. Mungro*, 754 F.3d 267, 272 (4th Cir. 2014); or whether the issue concerns the type of building entered, see *United States v. Beatty*, 702 F. App'x 148, 150 (4th Cir. 2017) (unpublished).

In myriad unpublished decisions, the Fourth Circuit has affirmed ACCA sentences based upon North Carolina B&E convictions. *See, e.g., United States v. Farrior*, 202 F. App'x 643 (4th Cir. 2006); *United States v. Stevens*, 342 F. App'x 873 (4th Cir. 2009); *United States v. Harris*, 458 F. App'x 297 (4th Cir. 2011); *United States v. McClain*, 442 F. App'x 862 (4th Cir. 2011); and, *United States v. Terry*, 547 F. App'x 367 (4th Cir. 2013). The Supreme Court's most recent opinion regarding generic burglary, *United States v. Stitt*, 139 S. Ct. 399, 405-06 (2018), does not call into question any of these cases.

Because North Carolina B&E in violation of N.C.G.S § 14-54 “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),” *Mungro*, 754 F.3d at 272, the Court should overrule the defendant's objection to the PSR. In

the alternative, if the Court is inclined to overrule more than a quarter century of Fourth Circuit precedent, the government would ask to continue the sentencing to allow the government to brief the matter with more than two days' notice.

This, the 18th day of December, 2018.

Respectfully submitted,

MATTHEW G.T. MARTIN
United States Attorney

/S/ STEPHEN T. INMAN
Deputy Chief, Criminal Division
Assistant United States Attorney
N.C. State Bar. No. 26913
United States Attorney's Office
Middle District of North Carolina
101 S. Edgeworth St., 4th Floor
Greensboro, NC 27401
Phone: 336/333-5351

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA :
 :
 v. : 1:18CR185-1
 :
 ISIAH PAUL MENDEZ : FILED UNDER SEAL

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2018, the foregoing was electronically filed with the Clerk of the Court under seal using the CM/ECF system, which will send notification of such filing to the following:

Todd A. Smith, Esq.

Respectfully submitted,

MATTHEW G.T. MARTIN
United States Attorney

/S/ STEPHEN T. INMAN
Deputy Chief, Criminal Division
Assistant United States Attorney
N.C. State Bar. No. 26913
United States Attorney's Office
Middle District of North Carolina
101 S. Edgeworth St., 4th Floor
Greensboro, NC 27401
Phone: 336/333-5351

FILED: March 22, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4050
(1:18-cr-00185-WO-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ISIAH PAUL MENDEZ

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

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

No. 19-4050

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ISIAH PAUL MENDEZ,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. William L. Osteen, Jr., District Judge. (1:18-cr-00185-WO-1)

Submitted: February 17, 2022

Decided: March 22, 2022

Before DIAZ, THACKER, and RICHARDSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Todd A. Smith, SMITH GILES PLLC, Graham, North Carolina, for Appellant. Matthew G.T. Martin, United States Attorney, Stephen T. Inman, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

47

PER CURIAM:

Isiah Paul Mendez pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court sentenced Mendez under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), to 188 months' imprisonment. On appeal, Mendez challenges his classification as an armed career criminal, arguing that his prior North Carolina breaking or entering convictions did not qualify as violent felonies because North Carolina's breaking or entering statute, N.C. Gen. Stat. § 14-54(a), is broader than a generic burglary statute.

As we recently explained, this argument is foreclosed by our decision in *United States v. Mungro*, 754 F.3d 267, 272 (4th Cir. 2014). See *United States v. Dodge*, 963 F.3d 379, 382-84 (4th Cir. 2020) (reaffirming that "§ 14-54(a), as interpreted by the North Carolina Supreme Court, sweeps no more broadly than the generic elements of burglary and therefore a conviction under that statute qualifies as an ACCA predicate conviction" (internal quotation marks omitted)), *cert. denied*, 141 S. Ct. 1445 (2021). 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

* Although we placed this appeal in abeyance for *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), *rev'd*, *Greer v. United States*, 141 S. Ct. 2090 (2021), it is clear after the decision in *Greer* that Mendez's conviction does not run afoul of *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

RECORD NO. 19-4050

In The
United States Court Of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

ISIAH PAUL MENDEZ,
Defendant – Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
AT GREENSBORO**

BRIEF OF APPELLANT

Todd A. Smith
SMITH GILES PLLC
110 South Maple Street
Graham, NC 27253
(336) 222-7735

Counsel for Appellant



TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
1. Basis for Subject Matter Jurisdiction in the District Court.....	1
2. Basis for Jurisdiction in the Court of Appeals	1
3. The Sentence is Appealable	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE.....	3
Statement of the Case	3
Statement of the Facts.....	4
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
1. THE DISTRICT COURT ERRED BY FINDING THAT MR. MENDEZ HAS THREE PREDICATE FELONIES WHICH ENHANCE HIM AS AN ARMED CAREER OFFENDER PURSUANT TO THE ARMED CAREER CRIMINAL ACT, 18 U.S.C. § 924(e).....	7
Standard of Review	7
Discussion	7
The Statute	7
The <u>Taylor</u> Case	8
The <u>Shepard</u> and <u>Descamps</u> Cases.....	9

Applicability of Divisibility to this Case	10
<u>Mathis</u>	10
North Carolina Breaking and Entering Statute	11
The Case at Hand	11
Contrary Opinions.....	12
<u>Mungro</u>	12
Cases argued by Government	13
CONCLUSION	15
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF FILING AND SERVICE	

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>Descamps v. United States</u> , 133 S. Ct. 2276 (2013).....	9
<u>James v. United States</u> , 550 U.S. 192 (2007).....	11, 13
<u>Mathis v. United States</u> , 136 S. Ct. 2243 (2016).....	10
<u>Shepard v. United States</u> , 544 U.S. 13 (2005).....	9, 10
<u>State v. Burgess</u> , 1 N.C. App. 104 (1968).....	12
<u>State v. Jones</u> , 272 N.C. 108 (1967).....	12
<u>State v. O’Neal</u> , 77 N.C. App. 600 (1985).....	11
<u>State v. Wooten</u> , 1 N.C. App. 240 (1968).....	11
<u>Taylor v. United States</u> , 495 U.S. 575 (1990).....	8, 10, 11, 15
<u>United States v. Beatty</u> , 702 F. App’x 148 (4 th Cir. 2017).....	13, 14
<u>United States v. Billy Ray Thompson</u> , 615 F. App’x 160 (4 th Cir. 2015).....	12-13
<u>United States v. Bowden</u> , 975 F.2d 1080 (4 th Cir. 1992).....	13

<u>United States v. Carr,</u> 592 F.3d 636 (4 th Cir. 2010)	14
<u>United States v. Diaz-Ibarra,</u> 522 F.3d 343 (4 th Cir. 2008)	7
<u>United States v. Gomez,</u> 690 F.3d 194 (4 th Cir. 2012)	7
<u>United States v. Henriquez,</u> 757 F.3d 144 (4 th Cir. 2014)	11
<u>United States v. McNatt,</u> 727 F. App'x 68 (4 th Cir. 2018)	14
<u>United States v. Michael Jerome Thompson,</u> 588 F.3d 197 (4 th Cir. 2009)	14
<u>United States v. Mungro,</u> 745 F.3d 267 (4 th Cir. 2014)	12
<u>United States v. Tony Lee Thompson,</u> 421 F.3d 278 (4 th Cir. 2005)	13
Statutes	
18 U.S.C. § 922(g)	1, 3, 7
18 U.S.C. § 924(a)(2)	1, 7
18 U.S.C. § 924(e)	<i>passim</i>
18 U.S.C. § 924(e)(2)(B)(ii)	7
18 U.S.C. § 3742(a)	1
28 U.S.C. § 1291	1
N.C. Gen. Stat. § 14-51	11

N.C. Gen. Stat. § 14-54.....	3, 4, 6
N.C. Gen. Stat. § 14-54(a)	11
Constitutional Provisions	
U.S. Const. amend VI	14
Rules	
Fed. R. App. P. 4(b)	1

JURISDICTIONAL STATEMENT

1. Basis for Subject Matter Jurisdiction in the District Court

This appeal is from the plea and sentence of the Defendant's criminal conviction in the United States District Court for the Middle District of North Carolina, before the Honorable William L. Osteen, Jr. Jurisdiction attached in the District Court pursuant to 18 U.S.C. §§ 922(g), and 924(a)(2) (JA 6)¹.

2. Basis for Jurisdiction in the Court of Appeals

This Honorable Court has jurisdiction over appeals from final judgments of the District Court under 28 U.S.C. § 1291, 18 U.S.C. § 3742(a) and Fed. R. App. P. 4(b).

3. The Sentence is Appealable

On August 9, 2018, Mr. Mendez pled guilty, pursuant to a written plea agreement, to one count of possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g) and 924(a)(2)(JA 12). Judgment was entered on January 22, 2019 and amended on January 28, 2019 (JA 73, 80). The Defendant filed a timely notice of appeal on December 21, 2018 (JA 71). This appeal is from a final order.

¹ JA 6 denotes page 6 of the joint appendix

STATEMENT OF THE ISSUES

The sole issue on appeal is whether the District Court erred by finding that Mr. Mendez was an armed career offender pursuant to 18 U.S.C. § 924(e) based upon three prior convictions of felony breaking and entering under North Carolina law and therefore sentencing him at an enhanced level based upon that finding.

STATEMENT OF THE CASE

Statement of the Case

On May 29, 2018 a grand jury seated in the Middle District of North Carolina returned a two count indictment against Isiah Mendez accusing him in count one with possessing a firearm after being convicted of a felony pursuant to 18 U.S.C. § 922(g) (JA 6). The remaining count dealt with a co-defendant and did not charge him with a crime. On August 9, 2018, Mr. Mendez pled guilty to the above mentioned offense, pursuant to a written plea agreement (JA 12).

On October 22, 2018 a draft pre-sentence report, (hereafter "PSR") was prepared by the probation office in the Middle District of North Carolina and promulgated to the parties (JA 93). In this draft PSR, Mr. Mendez's sentence was enhanced, pursuant to 18 U.S.C. § 924(e) because he had three prior convictions for felony breaking and entering under North Carolina law (JA 73, 80).

The prior convictions that were the basis for the ACCA enhancement were a conviction for felony breaking and entering, in violation of N.C. Gen. Stat. § 14-54 in Mecklenburg County, North Carolina, disposed of on February 23, 2013 (JA 100 ¶ 29), a conviction for felony breaking and entering, in violation of N.C. Gen. Stat. § 14-54 in Guilford County, North Carolina, disposed of on October 23, 2014 (JA 102 ¶ 33) and a conviction for felony breaking and entering, in violation of N.C. Gen.

Stat. § 14-54 in Rowan County, North Carolina, disposed of on November 2, 2014 (JA 104 ¶ 35).²

On November 5, 2018, Mr. Mendez gave notice that he intended to object to his designation as an armed career offender (JA 90). On December 17, 2018 he filed a position paper arguing that he should not be enhanced as an armed career offender (JA 120), a position that was rebutted by the Government on December 18, 2018 (JA 129).

On December 20, 2018 Mr. Mendez was sentenced by the Court, with the Honorable Judge William Osteen, Jr. presiding, and was found to be an armed career offender (JA 73, 80, 134). He was sentenced to 188 months in prison as punishment for this offense.

Mr. Mendez filed notice of appeal on December 21, 2018 (JA 71). The final judgment in the case was filed by the Court on January 22, 2019 and amended on January 28, 2019 (JA 73, 80).

Statement of the Facts

On September 1, 2017 Kannapolis Police Officers responded to a “shots fired” call at the home address of Kim Best in Kannapolis, North Carolina. An unknown person had shot into her home (JA 96 ¶6). Mr. Mendez, who was 21 years old at the

² Mr. Mendez had another breaking and entering conviction in Mecklenburg County, N.C. that was consolidated with one of the above mentioned charges (JA 101 ¶ 30).

time of the offense, was sleeping on the sofa in Mrs. Best's house and was shot in the leg during the incident.

When law enforcement responded to the house, they searched and recovered a .380 caliber pistol in the living room (JA 96 ¶ 7). After performing a trace, they found that the gun had been purchased by Mrs. Best. Further research on Facebook revealed that Mrs. Best had purchased the firearm for Mr. Mendez (JA 96 ¶ 7). After further interrogation, both Mrs. Best (JA 97 ¶ 9) and Mr. Mendez (JA 97 ¶ 11) admitted that he had possessed the firearm. Law enforcement officers also determined that the firearm had crossed State lines and was therefore involved in interstate commerce (JA 9).

SUMMARY OF THE ARGUMENT

The Appellant contends that his convictions for felony breaking and entering (N.C. Gen. Stat. § 14-54 and the common law) in North Carolina should not be allowed as predicates for enhancement under the Armed Career Criminal Act (hereafter “ACCA”) codified at 18 U.S.C. § 924(e) when applying the categorical approach to those cases because the North Carolina statute can be violated by breaking, without entering, a structure.

ARGUMENT

1. **THE DISTRICT COURT ERRED BY FINDING THAT MR. MENDEZ HAS THREE PREDICATE FELONIES WHICH ENHANCE HIM AS AN ARMED CAREER OFFENDER PURSUANT TO THE ARMED CAREER CRIMINAL ACT, 18 U.S.C. § 924(e).**

Standard of Review

When determining what the proper interpretation of the law should be regarding what qualifies as a predicate for Armed Career Criminal purposes, a de novo standard should be used, United States v. Gomez, 690 F.3d 194 (4th Cir. 2012), United States v. Diaz-Ibarra, 522 F.3d 343 (4th Cir. 2008).

Discussion

The Statute

The ACCA is codified at 18 U.S.C. § 924(e). The Act requires imprisonment of not less than fifteen years for a person who has been convicted of possession of a firearm after being convicted of a felony pursuant to 18 U.S.C. § 922(g) and who also has three previous convictions for a violent felony and/or for a serious drug offense. This sentencing enhancement increases the penalty for 18 U.S.C. § 922(g) which provides for a maximum sentence of ten years imprisonment without the ACCA predicates (18 U.S.C. § 924(a)(2)).

The definitions for which prior convictions qualify as predicates under the Act are codified within the Act. In this case, the relevant portion of the statute is located at 18 U.S.C. § 924(e)(2)(B)(ii) which includes “burglary” as an enumerated offense

that triggers a predicate offense under the Act. The Courts have been wrestling with the definition of what State crimes qualify as a burglary for ACCA purposes for over thirty years.

The Taylor Case

In Taylor v. United States, 495 U.S. 575 (1990), after considering splits among the Courts, the Supreme Court decided to take on the task of providing a definition that would allow Courts to decide what State crimes should be included and excluded as a burglary under the ACCA. The Court decided that it would provide a generic definition of burglary and then compare State statutes to that definition to determine whether or not they would qualify as ACCA predicates.

The Court promulgated a definition of generic burglary based upon the majority of the State's current statutes regarding burglary at that time and the model penal code. Their definition included the following elements: 1. unlawfully entering, or remaining within 2. a building or structure, 3. with the intent to commit a crime. The Court expressly decided that the common law definition of burglary, which required an entrance into a home after dark, would not be part of the "generic" definition of burglary.

Taylor then went on to decide that a categorical approach would be used when deciding whether a crime was a burglary or not. The categorical approach required a Court to compare the State statute at hand to the generic definition of burglary to

determine whether or not the crime could be a predicate for the ACCA enhancement. The categorical approach expressly forbade requiring Courts from determining what the facts were in each individual's case. They were only allowed to determine whether or not the statute itself was equivalent to the generic definition of burglary. The Court reasoned that this approach would be both practical, as it would prevent re-litigation of disposed cases, and would be fair, as it would not require parties to preserve old evidence that may not be available at a later sentencing date.

The Shepard and Descamps Cases

In Shepard v. United States, 544 U.S. 13 (2005), the Court determined that some criminal statutes codified more than one crime. It was determined by the Court that when a statute contained more than one crime, a modified categorical approach could be used to determine what crime a defendant was actually convicted of and therefore could determine whether or not it was a predicate offense under the ACCA. In Shepard, lower Courts were only allowed to use certain charging documents and plea agreements to make the determination of what statute had been violated, preventing re-litigation of the facts of each case.

Descamps v. United States, 133 S. Ct. 2276 (2013) furthered our understanding of when it was appropriate to use the modified categorical approach. The Court found that modified categorical approach can only be used when a statute is divisible into different elements for crimes. If a statute had different ways of

finding one element, but it was not a separate crime then the statute could not be a predicate offense under the ACCA. However, if more than one crime was alleged, then the modified approach could be used.

Applicability of Divisibility to this Case

The North Carolina breaking and entering statute is divisible as it contains a punishment that is both a misdemeanor and a felony. However, in this case both parties agree that Mr. Mendez's prior convictions are felonies and therefore there is no need to look at the documents allowed under Shepard to determine which crime applies.

As to the crime of felony breaking and entering, in North Carolina, the first element "breaking or entering" gives different ways to complete one element of a single crime. The statute is disjunctive in that the element can be satisfied by either breaking or entering a structure. This will be further argued below.

Mathis

In 2016, the Court decided Mathis v. United States, 136 S. Ct. 2243 (2016) which ruled that a State statute that is broader than the generic definition of burglary could not be used as a predicate for the ACCA. In that case, the Iowa burglary statute included entering into certain vehicles that would not be considered buildings under the generic definition provided in Taylor. The Court found that this conviction could not be used as an ACCA predicate. Other cases have bolstered this opinion, *i.e.*

James v. United States, 550 U.S. 192 (2007) – FL statute that prevents breaking into curtilage is overbroad and United States v. Henriquez, 757 F.3d 144 (4th Cir. 2014) MD statute that prevents breaking into vehicles is overbroad.

North Carolina Breaking and Entering Statute

In North Carolina, felony breaking and entering is defined at N.C. Gen. Stat. § 14-54(a)³. In order to commit this crime, a person must 1. break or enter 2. a building 3. with intent to commit a felony or larceny therein (emphasis added).

The Case at Hand

Mr. Mendez argues that the North Carolina breaking and entering statute should not be used as a predicate for the ACCA as it can be committed in a way that is broader than the generic definition of burglary that has been promulgated by the Supreme Court. In North Carolina, you can be found guilty of breaking a building without entering or remaining within that building, which, of course, is one of the elements of generic burglary promulgated in the Taylor case.

It is long settled law in North Carolina that felony breaking and entering can be committed by breaking a structure without entering, State v. O'Neal, 77 N.C. App. 600 (1985). In State v. Wooten, 1 N.C. App. 240 (1968), the Court found a

³ Section (b) of the statute also provides the elements of misdemeanor breaking and entering. North Carolina also has kept the common law burglary offense, N.C. Gen. Stat. § 14-51 and common law, which includes breaking into a dwelling house at night. This crime has a higher level of punishment than breaking and entering in North Carolina.

person guilty of breaking or entering when he broke the window of a gas station but did not make entry into the station. Other North Carolina cases have found the same result, See State v. Burgess, 1 N.C. App. 104 (1968) and State v. Jones, 272 N.C. 108 (1967). Since the North Carolina definition of felony breaking and entering is clearly broader than the generic statute, both when reading the express wording of the statute and the State Court's interpretation of the case law, Mr. Mendez argues that it should not be used as a predicate for the ACCA.

Contrary Opinions

Mungro

In 2018, the Fourth Circuit decided United States v. Mungro, 745 F.3d 267 (4th Cir. 2014). In Mungro, the Defendant argued that the North Carolina breaking and entering statute allowed a person to lawfully enter a building with intent to commit a felony therein and therefore was broader than the generic definition of burglary. After a thorough analysis of the interpretation of the State's law the Court determined that this was not the intent of the statute under North Carolina law. No discussion of whether or not breaking by itself made the North Carolina statute overbroad was heard during the case.

In subsequent cases, the Court has treated Mungro as foreclosing further inquiry into whether or not the North Carolina breaking and entering statute qualifies as a crime of violence under the ACCA, see United States v. Billy Ray Thompson,

615 F. App'x 160 (4th Cir. 2015) (unpublished) and United States v. Beatty, 702 F. App'x 148 (4th Cir. 2017) (unpublished). However, Mr. Mendez's argument does not appear to have been litigated by the Appellate Courts.

Cases argued by Government

In the Government's position paper, several cases were pointed out regarding the applicability of the North Carolina breaking and entering statute as a predicate for the ACCA. Mr. Mendez can differentiate each of these from his case. In United States v. Bowden, 975 F.2d 1080 (4th Cir. 1992) the Court decided a case that had to do with whether a person had to both break and enter a building unlawfully in order to fit the generic definition of burglary. In that case the Defendant had entered a building unlawfully but had not broken the building in any way. The Court found that this was sufficient for the general burglary definition. Later cases have shown that the entry requirement is a part of the general definition of burglary, see i.e. James v. United States, 550 U.S. 192 (2007) – FL statute that prevents breaking into curtilage is overbroad because no entry into a structure was made. Mr. Mendez's argument is the opposite of the one made in Bowden, it is not the entry that makes the North Carolina statute different from the general definition of burglary, it is the fact that merely breaking, with no entry makes the statute overbroad.

In United States v. Tony Lee Thompson, 421 F.3d 278 (4th Cir. 2005), the case was not based upon whether or not North Carolina breaking and entering was an

ACCA predicate. In that case the Defendant's argument was that a jury, not a Court itself, had to find ACCA predicates due to his Sixth Amendment Rights under the Constitution. That argument has not been raised in the case at hand. In United States v. Michael Jerome Thompson, 588 F.3d 197 (4th Cir. 2009), the case was decided based upon the violence clause of the ACCA, not upon the enumerated burglary clause of the statute. While it does appear that Mr. Thompson had a breaking and entering conviction, again it does not appear that that was the focus of this decision.

In United States v. Carr, 592 F.3d 636 (4th Cir. 2010), the issue decided was whether or not breaking into multiple apartment units constituted one breaking and entering or multiple breaking and entering offenses. It does not appear that there was an argument in that case regarding whether or not the North Carolina breaking and entering statute should be an ACCA predicate. In United States v. McNatt, 727 F. App'x 68 (4th Cir. 2018) it appears that the Court was focused on the violence clause and not on breaking and entering as a generic burglary.

Finally, in United States v. Beatty, 702 F. App'x 148 (4th Cir. 2017) (unpublished). The question was whether or not a vehicle can constitute a building under the North Carolina breaking and entering statute. Again, it does not appear that the entry portion of the burglary clause was argued or decided in that case.

CONCLUSION

Since North Carolina's felony breaking and entering statute can be violated by breaking a structure without entering into that structure, it is broader than the generic definition of burglary promulgated by the United States Supreme Court in Taylor v. United States, 495 U.S. 575 (1990). Since it is broader than the generic definition in Taylor, convictions under the North Carolina felony breaking and entering statute should not be used as predicate offense for purposes of the Armed Career Criminal Act. Mr. Mendez's case should therefore be remanded for sentencing without the ACCA enhancement.

Respectfully submitted this the 4th day of June, 2019.

/s/ Todd A. Smith
Todd A. Smith
Smith Giles PLLC
Attorney for Defendant-Appellant
N.C. State Bar Number 26758
110 South Maple Street
Graham, North Carolina 27253
(336) 222-7735
Email: taslaw@triad.rr.com

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

this document contains 2,975 words.

2. This document complies with the typeface requirements because:
this document has been prepared in a proportional spaced typeface using Microsoft Word in 14 point Times New Roman.

Respectfully submitted this the 4th day of June, 2019.

/s/ Todd A. Smith
Todd A. Smith
Smith Giles PLLC
Attorney for Defendant-Appellant
N.C. State Bar Number 26758
110 South Maple Street
Graham, North Carolina 27253
(336) 222-7735
Email: taslaw@triad.rr.com

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 4, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Shelly N. Gannon
Shelly N. Gannon
GIBSON MOORE APPELLATE SERVICES, LLC
P.O. Box 1460
Richmond, VA 23218
(804) 249-7770
shelly@gibsonmoore.net

No. 19-4050

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

UNITED STATES OF AMERICA,

Appellee,

v.

ISIAH PAUL MENDEZ,

Appellant.

On Appeal from the United States District Court
for the Middle District of North Carolina at Greensboro

BRIEF FOR APPELLEE

MATTHEW G.T. MARTIN
United States Attorney

STEPHEN T. INMAN
Assistant United States Attorney

101 S. Edgeworth Street, 4th Floor
Greensboro, NC 27401
(336) 333-5351

Attorneys for Appellee
Date: July 16, 2019

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION	1
ISSUE PRESENTED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. The District Court Followed This Court's Precedent in Finding that Mendez Had at Least Three Convictions for a Violent Felony and was an Armed Career Criminal.....	5
Standard of Review	5
Discussion of the Issue	5
CONCLUSION	13
CERTIFICATE OF COMPLIANCE	14
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	2, 3
<i>State v. Baskin</i> , 190 N.C. App. 102 (2008).....	10
<i>State v. Burgess</i> , 1 N.C. App. 104 (1968).....	11
<i>State v. Eldridge</i> , 83 N.C. App. 312 (1986).....	10
<i>State v. Jolly</i> , 297 N.C. 121 (1979)	11
<i>State v. Jones</i> , 264 N.C. 134 (1965)	12
<i>State v. Jones</i> , 272 N.C. 108 (1967)	11
<i>State v. Myrick</i> , 306 N.C. 110 (1982)	9
<i>State v. O'Neal</i> , 77 N.C. App. 600 (1985).....	11
<i>State v. Wooten</i> , 1 N.C. App. 240 (1968).....	12
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).....	5, 10
<i>United States v. Beatty</i> , 702 F. App'x 148 (4th Cir. 2017)	8
<i>United States v. Bowden</i> , 975 F.2d 1080 (4th Cir. 1992).....	5, 9
<i>United States v. Carr</i> , 592 F.3d 636 (4th Cir. 2010).....	6

<i>United States v. Farrior</i> , 202 F. App'x 643 (4th Cir. 2006)	8
<i>United States v. Harris</i> , 458 F. App'x 297 (4th Cir. 2011)	8
<i>United States v. McClain</i> , 442 F. App'x 862 (4th Cir. 2011)	8
<i>United States v. McNatt</i> , 727 F. App'x 68 (4th Cir. 2018)	8
<i>United States v. Michael Jerome Thompson</i> , 588 F.3d 197 (4th Cir. 2009).....	6
<i>United States v. Mungro</i> , 754 F.3d 267 (4th Cir. 2014).....	4, 7, 8, 9, 10
<i>United States v. Stevens</i> , 342 F. App'x 873 (4th Cir. 2009)	8
<i>United States v. Terry</i> , 547 F. App'x 367 (4th Cir. 2013)	8
<i>United States v. Tony Lee Thompson</i> , 421 F.3d 278 (4th Cir. 2005).....	6
<i>United States v. Wardrick</i> , 350 F.3d 446 (4th Cir. 2003).....	5

Statutes

18 U.S.C. § 922(g)(1).....	3
18 U.S.C. § 924(e)	4
18 U.S.C. § 924(e)(2)(B)(ii)	4
18 U.S.C. § 3231	2
28 U.S.C. § 1291	2
N.C. Gen. Stat. § 14-54.....	4, 6, 7, 9
N.C. Gen. Stat. § 14-54(a)	7

No. 19-4050

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

UNITED STATES OF AMERICA,

Appellee,

v.

ISIAH PAUL MENDEZ,

Appellant.

On Appeal from the United States District Court
for the Middle District of North Carolina

BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

Isiah Paul Mendez appeals his 180-month sentence for being an armed career criminal in possession of a firearm. The district court had jurisdiction under 18 U.S.C. § 3231 and entered final judgment on January 22, 2019. JA76. Mendez timely appealed on December 21, 2018. JA74. Because Mendez directly appeals from a final judgment to

challenge his sentence, this Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

A defendant is subject to the Armed Career Criminal Act's (ACCA) enhanced penalties if he has three convictions for a "violent felony." This Court has held for decades—both before and after *Johnson v. United States*, 135 S. Ct. 2551 (2015)—that North Carolina breaking or entering ("B&E") is "generic burglary" and, therefore, an ACCA predicate. Was it error for the district court to find that Mendez's five B&E convictions subjected him to the ACCA's enhanced penalties?

STATEMENT OF THE CASE

Kannapolis Police officers responded to a shots-fired call at the home of Kim Best. JA96. They found Mendez in the living room shot in the leg, with a .380 pistol near the sofa where he had been sleeping. *Id.* An ATF investigation revealed that Best had bought the gun a week before. *Id.* She admitted that it was a "straw purchase"—Mendez was the true buyer of the gun all along. *Id.* Mendez confessed to officers in a post-*Miranda* interview that this was true. *Id.* at 97. Later, while in state

prison on an unrelated offense, Mendez reportedly sent a letter to Best, telling her "Bitch You betta STFU Talkin to the police last time your crib got shoot [sic] at 1 Person got hit If U tell the Police anything else or cooperate further we going to kick in your door N tie you face down to your bed." *Id.* at 98. The letter goes on to threaten Best in graphic terms with rape and sodomy, assaults with a gun, and death. *Id.*

A federal grand jury indicted Mendez for possessing the Cobra .380 caliber handgun as a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a). JA9. Mendez pled guilty pursuant to a written plea agreement. JA15. At his change-of-plea hearing, the district court reviewed the enhanced penalties of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), with Mendez and he acknowledged that he understood them. JA33.

Mendez's pre-sentence investigation report ("PSR") listed five violent felonies—all B&E convictions—and designated him an armed career criminal pursuant to 18 U.S.C. § 924(e). JA99-104. To qualify for ACCA designation, a defendant must have "three previous

272
7/16

convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e).

Mendez objected to the ACCA designation, and both parties filed position papers. JA119-133.

The district court held the sentencing in December 2018. JA46. At the sentencing hearing, Mendez argued that this Court’s holding in *United States v. Mungro*, 754 F.3d 267 (4th Cir. 2014)—finding that North Carolina breaking or entering pursuant to North Carolina General Statute § 14-54 qualified as “burglary” under 18 U.S.C. § 924(e)(2)(B)(ii)—did not bind the district court. JA52-57. The district court determined otherwise and overruled Mendez’s objection. JA57-58. The district court ultimately sentenced Mendez at the bottom of his advisory range, 188 months. JA67. This timely appeal followed.

SUMMARY OF ARGUMENT

Mendez claims that North Carolina breaking or entering (N.C. Gen. Stat. § 14-54) (“B&E”) is not a violent felony under the Armed Career Criminal Act (ACCA), because that crime cannot satisfy the categorical approach. The black-letter law of this Circuit for more than 25 years—

and reaffirmed in recent years—holds that North Carolina B&E qualifies as “generic burglary” and is, therefore, an ACCA violent felony.

ARGUMENT

I. The District Court Followed This Court’s Precedent in Finding that Mendez Had at Least Three Convictions for a Violent Felony and was an Armed Career Criminal.

A. Standard of Review

In assessing a district court’s determination that a defendant is an armed career criminal, this Court reviews legal conclusions *de novo*. *United States v. Wardrick*, 350 F.3d 446, 451 (4th Cir. 2003).

B. Discussion of the Issue

In *Taylor v. United States*, 495 U.S. 575, 598 (1990), the Supreme Court held that “burglary” as used in the ACCA, refers to “‘burglary’ [in] the generic sense in which the term is... used in the criminal codes of most States.” Soon after, this Court addressed North Carolina B&E in *United States v. Bowden*, 975 F.2d 1080, 1085 (4th Cir. 1992), and held that “convictions under North Carolina law for breaking or entering under N.C.G.S. § 14-54 qualify as generic burglaries under the *Taylor* case and justify an enhancement of punishment under § 924(e)(2)(B)(ii).”

This Court addressed North Carolina B&E again in *United States v. Tony Lee Thompson*, 421 F.3d 278, 284 (4th Cir. 2005), holding that “we have already considered the question of whether the North Carolina statute proscribing ‘breaking or entering buildings,’ see N.C.G.S. § 14-54, constitutes ‘generic burglary.’ In *Bowden*, this court thoroughly examined ACCA, the Supreme Court’s decision in *Taylor*, and the North Carolina statute. Using these sources, we explained why violations of the North Carolina statute ‘must be within *Taylor*,’ and therefore are ‘violent felonies’ for ACCA purposes.” (citations omitted).

Later, in *United States v. Michael Jerome Thompson*, 588 F.3d 197, 202 (4th Cir. 2009), this Court again held that “a North Carolina conviction for ‘breaking or entering’ under North Carolina General Statutes § 14-54(a) is, as a matter of law, a ‘violent felony’ within the meaning of ACCA.”

In *United States v. Carr*, 592 F.3d 636, 638 (4th Cir. 2010), the Court again upheld an ACCA enhancement based upon multiple convictions under N.C.G.S 14-54, noting that “we recently reaffirmed

circuit precedent that breaking or entering under § 14-54(a) is an ACCA violent felony.”

The Fourth Circuit addressed the question again in *United States v. Mungro*, 754 F.3d 267 (4th Cir. 2014). Again, it found that North Carolina B&E is a predicate ACCA felony. *Id.* at 268. This Court looked to the Supreme Court’s generic definition of burglary to determine if the elements of North Carolina B&E corresponded to the definition of generic burglary. *Id.* at 269. In determining the elements of North Carolina B&E, the Fourth Circuit examined the statutory language and the North Carolina Supreme Court’s interpretation of that language. *Id.* at 269. This Court noted that the North Carolina Supreme Court’s “construction binds our ACCA analysis and brings the elements of [North Carolina B&E] within the generic definition of burglary as articulated by [the Supreme Court of the United States].” *Id.* at 270. As a result, the Fourth Circuit concluded that North Carolina B&E “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).” *Mungro*, 754 F.3d at 272.

This Court has affirmed numerous ACCA sentences based upon North Carolina B&E convictions. *See, e.g., United States v. Farrior*, 202 F. App'x 643 (4th Cir. 2006) (unpublished); *United States v. Stevens*, 342 F. App'x 873 (4th Cir. 2009) (unpublished); *United States v. Harris*, 458 F. App'x 297 (4th Cir. 2011) (unpublished); *United States v. McClain*, 442 F. App'x 862 (4th Cir. 2011) (unpublished); and, *United States v. Terry*, 547 F. App'x 367 (4th Cir. 2013) (unpublished). This includes cases after *Johnson*. *See, e.g., United States v. Beatty*, 702 F. App'x 148, 150 & n.3 (4th Cir. 2017) (unpublished); and *United States v. McNatt*, 727 F. App'x 68, 69 (4th Cir. 2018).

The weight of this Court's precedent is clear. Decades of decisions confirm that North Carolina B&E in violation of N.C.G.S § 14-54 "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)." *Mungro*, 754 F.3d at 272.

But, Mendez claims, North Carolina B&E is phrased in the disjunctive—"breaking or entering"—and therefore these cases must be wrong. Def.'s Br. at 11. Mendez claims that because "North Carolina's

felony breaking and entering statute can be violated by breaking a structure without entering into that structure," it is overly broad. *See* Def.'s Br. at 15. But this Court has been well aware of the disjunctive nature of North Carolina B&E for decades. Twenty-six years ago, following *Taylor*, the defendant in the *Bowden* case tried a similar ploy, and this Court rejected it:

This statute [N.C. Gen. Stat 14-54] corresponds with the *Taylor* opinion's definition of generic burglary insofar as it requires that the crime be directed against a building and that it be done with intent to commit another crime. However, the crime described in § 14-54 allows conviction on a showing of "breaking or entering," not breaking and entering. *See, e.g., State v. Myrick*, 306 N.C. 110, 291 S.E.2d 577, 579 (1982). Thus, the argument goes that a defendant may be convicted of this crime without proof of an "unlawful or unprivileged entry," one of the three indispensable elements of generic burglary under *Taylor*. We do not agree with the defendant's position, however. Following his pleas of guilty, the best case that Bowden can make under *Taylor* and the North Carolina statute is that he entered without breaking the buildings in question with intent to commit a felony or larceny therein.

Bowden, 975 F.2d at 1084.

Undeterred by this long line of case law, the defendant in *Mungro*, 754 F.3d at 270, dusted off the "disjunctive statute" argument that this Court rejected in *Bowden*: "As Mungro points out, North Carolina's

‘breaking or entering’ offense is unusual for the reason suggested by the conjunction in its name: it applies to ‘any person who breaks *or* enters any building with intent to commit any felony or larceny therein.” *Id.* (emphasis in the original). After discussing North Carolina Supreme Court precedent, this Court dismissed this argument, finding that North Carolina B&E “requires either breaking with intent to commit a felony or larceny therein, or entering without consent with intent to commit a felony or larceny therein. These alternatives correspond to the alternative ‘unlawful’ and ‘unprivileged’ entry requirements of the generic definition of burglary.” *Id.* (citing *Taylor*, 495 U.S. at 599).

In any event, North Carolina courts do not construe “breaking” as narrowly as Mendez would have it. North Carolina courts have defined “breaking” as: “any act of force, however slight, *employed to effect an entrance* through any usual or unusual place of ingress, whether open, partly open, or closed.” *State v. Baskin*, 660 S.E.2d 566, 572 (N.C. Ct. App. 2008) (emphasis added); and “any act of force, however slight, *used to make an entrance* ‘through any usual place of ingress, whether open, partly open, or closed.’” *State v. Eldridge*, 349 S.E.2d 881, 882-83 (N.C.

Ct. App. 1986) (quoting *State v. Jolly*, 254 S.E.2d 1, 5-6 (1979) (emphasis added)).

And the common law definition of “entry” is expansive. *See Entry*, BLACK’S LAW DICTIONARY 478 (6th ed. 1990) (“the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon” constitutes “entry.”). *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *227 (“As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient; as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one’s money, are all of them burglarious entries.”) Thus, even the cases that Mendez cites for the proposition that they encompass a mere breaking involve what the common law would consider both a breaking and an entering. *See, e.g., State v. Burgess*, 160 S.E.2d 110, 111 (N.C. Ct. App. 1968) (police at scene of break-in “found a pane of glass in the window broken and the screen pushed in from the outside.”); *State v. Jones*, 157 S.E.2d 610, 610 (N.C. 1967) (noting that the defendant broke out a large plate glass window); *State v. O’Neal*, 335 S.E.2d 920, 924 (N.C. Ct. App. 1985) (defendant

broke windows to deposit smoke grenades into home); *State v. Jones*, 141 S.E.2d 27, 28-29 (N.C. 1965) (defendants broke window to boiler room, entered it, and then broke window into main building); *State v. Wooten*, 161 S.E.2d 59, 60 (N.C. Ct. App. 1968) (noting that a window had been “pried open” and a “glass pane broken”). Therefore, whether by hand or instrumentality, each of these defendants broke the windows in the buildings they sought to burgle. Thus, while constituting a breaking under North Carolina law, these acts would also constitute entry at common law by the hand or instrument responsible for the broken glass.

Because Mendez is in the same position as Mr. Bowden, Mr. Mungro, and dozens of other defendants whose convictions of North Carolina B&Es were used to enhance their sentences under ACCA, the Court should affirm his sentence.

CONCLUSION

Because the district court properly determined that Mendez's five B&E convictions were ACCA violent felony predicates, the district court did not err and this Court should affirm the sentence.

Respectfully submitted,

MATTHEW G.T. MARTIN
United States Attorney

/s/ STEPHEN T. INMAN
Assistant United States Attorney
NCSB # 26913
United States Attorney's Office
Middle District of North Carolina
101 S. Edgeworth St., 4th Floor
Greensboro, NC 27402
Phone: 336/333-5351

Date: July 16, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 19-4050 Caption: United States v. Isiah Mendez

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT
Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Type-Volume Limit for Briefs: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

Type-Volume Limit for Other Documents if Produced Using a Computer: Petition for permission to appeal and a motion or response thereto may not exceed 5,200 words. Reply to a motion may not exceed 2,600 words. Petition for writ of mandamus or prohibition or other extraordinary writ may not exceed 7,800 words. Petition for rehearing or rehearing en banc may not exceed 3,900 words. Fed. R. App. P. 5(c)(1), 21(d), 27(d)(2), 35(b)(2) & 40(b)(1).

Typeface and Type Style Requirements: A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch). Fed. R. App. P. 32(a)(5), 32(a)(6).

This brief or other document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

 X this brief or other document contains 2184 words

 this brief uses monospaced type and contains lines

This brief or other document complies with the typeface and type style requirements because:

 X this brief or other document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14 or

 this brief or other document has been prepared in a monospaced typeface using in .

(s) Stephen T. Inman
Party Name: Appellee
Dated: July 16, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 16, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

Todd A. Smith, Esq.

/S/ STEPHEN T. INMAN
Assistant United States Attorney
NCSB # 26913
United States Attorney's Office
Middle District of North Carolina
101 S. Edgeworth Street, 4th Floor
Greensboro, NC 27401
Phone: 336/333-5351

RECORD NO. 19-4050

In The
United States Court Of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

ISIAH PAUL MENDEZ,
Defendant – Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
AT GREENSBORO**

REPLY BRIEF OF APPELLANT

Todd A. Smith
SMITH GILES PLLC
110 South Maple Street
Graham, NC 27253
(336) 222-7735

Counsel for Appellant

GibsonMoore Appellate Services, LLC
206 East Cary Street ♦ P.O. Box 1460 (23218) ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

(91)

TABLE OF CONTENTS

	Page:
TABLE OF AUTHORITIES	ii
ARGUMENT	1
BREAKING, WITH NO ENTERING, IS SUFFICIENT TO SATISFY THE ELEMENT OF “BREAKING OR ENTERING” UNDER NORTH CAROLINA GENERAL STATUTE SECTION 14-54.....	1
Introduction.....	1
Statute	1
Case Law.....	2
CONCLUSION	6
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF FILING AND SERVICE	

TABLE OF AUTHORITIES

Page(s):

Cases:

<u>State v. Barnett,</u> 41 N.C. App. 171, 254 S.E.2d 199 (1979)	3, 4, 5
<u>State v. Baskin,</u> 660 S.E.2d 566, 190 N.C. App. 102 (2008)	5
<u>State v. Burgess,</u> 160 S.E.2d 110, 1 N.C. App. 104 (1968)	3, 5
<u>State v. Eldridge,</u> 349 S.E.2d 881 (1986)	5
<u>State v. Jones,</u> 272 N.C. 108 (1967)	2, 3, 4, 5
<u>State v. Lassiter,</u> 15 NC App 265, 189 S.E.2d 798, cert denied, 281 N.C. 761, 191 S.E.2d 358 (1972)	4
<u>State v. O'Neal,</u> 77 N.C. App. 600, 335 S.E.2d 920 (1985)	4
<u>State v. Pittman,</u> 14 N.C. App. 588, 188 SE2d 694 (1972)	4
<u>State v. Smith,</u> 312 S.E.2d 222, 66 N.C. App. 570 (1984)	2
<u>State v. White,</u> 352 S.E.2d 261, 84 N.C. App. 299, cert denied, 321 N.C. 123 (1987)	2
<u>State v. Williams,</u> 411 S.E.2d 814, 330 N.C. 579 (1992)	2

Taylor v. United States,
495 U.S. 575 (1990).....1, 4, 5, 6

United States v. Bowden,
975 F.2d 1080 (4th Cir. 2017).....4

United States v. Mungro,
754 F.3d 267 (4th Cir. 2009).....4, 5

Statutes:

N.C. Gen. Stat. § 14-54
“Breaking or entering buildings generally”.....1, 2, 6

N.C. Gen. Stat. § 14-54(a)1, 3, 4

ARGUMENT

BREAKING, WITH NO ENTERING, IS SUFFICIENT TO SATISFY THE ELEMENT OF "BREAKING OR ENTERING" UNDER NORTH CAROLINA GENERAL STATUTE SECTION 14-54

Introduction

In its response brief, the Government appears to argue that N.C. Gen. Stat. § 14-54 cannot be committed merely by breaking without entering or conversely that all breakings are also entering under a combination of North Carolina and/or the common law because the definition of breaking is so broad that it would encompass all enterings.

The Defendant offers this reply brief to argue that the law in North Carolina in this area is clear and that a person can commit the North Carolina breaking or entering offense without any entering as required under the generic definition of burglary promulgated in Taylor v. United States, 495 U.S. 575 (1990).

Statute

North Carolina General Statute § 14-54(a) lays out the elements that need to be satisfied under State law to be convicted of felony breaking and entering. It states in its entirety: "Any person who wrongfully breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a class H felon" (emphasis added). While the crime is colloquially known as breaking and entering, the title of the statute itself is, "Breaking or entering buildings generally"

(emphasis added). The plain language of the statute states that a person can be found guilty of this crime by breaking a building without entering it at all.

Case Law

The Courts in North Carolina have continually found this result over the years. The essential elements of N.C. Gen. Stat. § 14-54 have been recited many times by the Courts, each time requiring breaking or entering as opposed to breaking and entering to find a conviction for the felony, See: State v. Williams, 411 S.E.2d 814, 330 N.C. 579 (1992), State v. White, 352 S.E.2d 261, 84 N.C. App. 299, cert denied 321 NC 123 (1987) and State v. Smith, 312 S.E.2d 222, 66 N.C. App. 570 (1984) as examples.

However, the State Courts have gone much further in their decisions than merely relying on the language of the statute. In State v. Jones, 272 N.C. 108, (1967), Mr. Jones objected to the jury instruction given at his trial, where he was found to have broken a building but had not entered it. The instruction stated that while the statute is often called breaking and entering, ... "the statute does not require both the breaking and entering before one can be found guilty of violating the statute." In the case, the Court found that definition of the law promulgated in the instruction to be correct and free from error and stated, "The pertinent language of G.S. 14-54 is, if any person, with intent to commit a felony or other infamous crime therein, shall break *or* enter any storehouse, shop, or other building where

merchandise, or other personal property shall be, he shall be guilty of a felony (emphasis added by the Court). This case clearly shows that one can break without entering a building in North Carolina and be found guilty of N.C. Gen. Stat. § 14-54(a).

Again in State v. Burgess, 160 S.E.2d 110, 1 N.C. App. 104 (1968), the North Carolina Courts confirmed that a person can be found guilty of N.C. Gen. Stat. § 14-54(a) by breaking without entering. In the Burgess case, which cites the Jones opinion, Mr. Burgess broke the window pane of a pharmacy in Raleigh but there was no evidence of entry. In that case, once again in no uncertain terms, the Court found that only breaking or entering was necessary for conviction. The Court went on to state that "The breaking of the store window, with the requisite 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." The Court actually stated in this case that no entering is required to commit the offense.

In State v. Barnett, 41 N.C. App. 171, 254 S.E.2d 199 (1979) the Court addressed the same issue from the other perspective. In that case, the Defendant had entered without proof of a breaking. However, in its opinion the Court explained the statute in this manner: "To convict of violating the statute, it is sufficient if the State's evidence shows either a breaking or an entering; it need not

show both.” (citing Jones, State v. Lassiter, 15 NC App 265, 189 S.E.2d 798 cert denied 281 N.C. 761, 191 S.E.2d 358 (1972) and State v. Pittman, 14 N.C. App. 588, 188 SE2d 694 (1972), each stating similar opinions. That sentiment is echoed in another “entering only” case, State v. O’Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985). While O’Neal involves entering without breaking, the Court used the language from Barnett as part of its opinion restating, “To convict a defendant of violation of G.S. 14-54(a), it is sufficient if the State’s evidence shows either a breaking or an entering, it need not show both.”

In the Government’s brief, it is claimed that this issue was addressed in United States v. Bowden, 975 F.2d 1080 (4th Cir. 2017) twenty six years ago (Govt.’s brief at 9). However, the issue here is not whether the North Carolina statute is disjunctive or not, both cases agree with the proposition that the statute is disjunctive. The issue here is whether or not the statute can be committed in a way that is not consistent with the generic definition of burglary defined in Taylor by breaking without entering, which was not addressed in the Bowden case.

The Government then goes on to argue that United States v. Mungro, 754 F.3d 267 (4th Cir. 2009) addresses the issue of whether or not breaking without entering can be committed under a categorical consideration of the North Carolina breaking and entering statute (Govt.’s brief at 10). However, once

again, this issue is not argued in Mungro; that the crime can be committed by breaking without entering without satisfying the generic elements of burglary from Taylor.

Further, the Government argues that Mendez has defined "breaking" more narrowly than the North Carolina Courts have and implies that essentially all breakings are enterings as well (Govt.'s brief at 10). The Government states that State v. Baskin, 660 S.E.2d 566, 572, 190 N.C. App. 102 (2008) and State v. Eldridge, 349 S.E.2d 881 (1986) stand for this proposition. While the Appellant concedes that both of those cases do set a low bar for the commission of an entrance in North Carolina, neither of them addresses the issue of whether a Defendant can break a building without entering as is directly addressed in the case in the Jones, Burgess, Barnett and similar cases listed above.

Also, this line of reasoning appears to fall into the trap of looking into each person's individual conduct when determining whether a statute fits into the generic definition of burglary as opposed to using the categorical approach to determine whether the crime can be committed in a manner that is more broad than the generic definition of burglary as required in Taylor.

The Government finally argues that the common law definition of entry should be considered by the Court to determine whether all breakings are also enterings (Govt.'s brief at 11). This argument fails in at least three ways. First, it

again falls into the trap of skirting the categorical approach required by Taylor. Second, it falls outside of the cases that have been directly decided upon by the State Courts. And third, it still allows for the commission of the offense while having made no entry whatsoever.

CONCLUSION

Because the North Carolina felony breaking or entering offense defined at N.C. Gen. Stat. § 14-54 can be committed in a way that is more broad than the generic definition of burglary promulgated in Taylor v. United States, it should not be used as a predicate offense under the Armed Career Criminal Act.

Respectfully submitted this 29th day of July, 2019.

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

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

this document contains 1,324 words.

2. This document complies with the typeface requirements because:

this document has been prepared in a proportional spaced typeface using Microsoft Word in 14 point Times New Roman.

Respectfully submitted this the 29th day of July, 2019.

/s/ Todd A. Smith
Todd A. Smith
Smith Giles PLLC
Attorney for Defendant-Appellant
N.C. State Bar Number 26758
110 South Maple Street
Graham, North Carolina 27253
(336) 222-7735
Email: taslaw@triad.rr.com

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 29, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Karen R. Taylor

Karen R. Taylor

GIBSON MOORE APPELLATE SERVICES, LLC

P.O. Box 1460

Richmond, VA 23218

(804) 249-7770

karen@gibsonmoore.net