No. _____

IN THE
Supreme Court of the United States

BANGO BENJAMIN ENYINNAYA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether North Carolina breaking or entering is categorically broader than generic burglary and thus cannot be a violent felony under the Armed Career Criminal Act when it can be committed by breaking into vehicles and structures that house only property and no people and without any entry at all.

2. Whether North Carolina breaking or entering is categorically broader than generic burglary because it does not have an "entry" requirement and is thus categorically attempted burglary.

3. Whether, in light of the United States recently conceding that a jury must find beyond a reasonable doubt that a defendant committed his Armed Career Criminal Act prior convictions on "occasions different from one another," this Court should vacate the Fourth Circuit's opinion and remand to the Fourth Circuit to conduct a plain error review of this question in the first instance.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit:

United States v. *Enyinnaya*, 2022 U.S. App. LEXIS 3602, 2022 WL 396020 (4th Cir. Case No. 18-4400, Feb. 9, 2022; Petition for en banc review denied May 17, 2022).

United States District Court for the Eastern District of North Carolina:

United States v. *Enyinnaya*, No. 5:17-CR-55-FL-1

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PETITION FOR WRIT OF CERTIORARI

Petitioner Banjo Enyinnaya respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's unpublished opinion is reported at 2022 U.S. App. LEXIS 3602 and 2022 WL 396020 and produced at Pet. App. 1a. The Fourth Circuit denied a timely petition for rehearing en banc, which is produced at Pet. App.4a.

JURISDICTION

The district court had jurisdiction over the criminal prosecution under 18 U.S.C. §§ 922, 3231. Mr. Enyinnaya timely appealed the district court's final judgment. The Fourth Circuit had jurisdiction under 18 U.S.C. § 3742 over that timely appeal from a final order. The Fourth Circuit issued its opinion affirming Mr. Enyinnaya's sentence on February 9, 2022. The Fourth Circuit denied a timely petition for rehearing en banc on May 17, 2022. On August 8, 2022, the Chief Justice granted

Mr. Enyinnaya's application to extend the deadline to file any petition for a writ of certiorari until October 14, 2022. This petition is being timely filed on October 14, 2022. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1) provides that the Armed Career Criminal Act sentence enhancement applies to a person who, among other things, "has three previous convictions . . . for a violent felony . . . committed on occasions different from one another."

18 U.S.C. § 924(e)(2)(B) provides, in pertinent part, that a "violent felony" under the Armed Career Criminal Act is:

> Any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another;
>
> or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another

N.C. Gen. Stat. § 14-54 defines breaking or entering as follows:

> (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.

> (a1) Any person who breaks or enters any building with intent to terrorize or injure an occupant of the building is guilty of a Class H felony.
>
> (b) any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor.
>
> (c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

INTRODUCTION

North Carolina's breaking or entering statute is categorically broader than generic burglary in the Armed Career Criminal Act ("ACCA"). It allows conviction for those who break into buildings and vehicles designed to store property and no people. Under this Court's decisions in *United States* v. *Stitt*, 139 S. Ct. 399 (2018), *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), and *Taylor* v. *United States*, 495 U.S. 575 (1990), such a statute does not present the requisite risk of violent confrontation and thus is categorically overbroad. And the North Carolina statute is categorically overbroad for another reason: It does not even require entry, a key element of generic burglary as defined in *Taylor*. This Court and six courts of appeals that have considered analogous attempted burglary statutes have held they are categorically broader than generic burglary.

In response to these cases, the Fourth Circuit, in *United States v. Dodge*, recently re-affirmed its prior cases and held that North Carolina breaking or

entering is still an ACCA violent felony. 963 F.3d 379 (4th Cir. 2020).[1] The Fourth Circuit in *Dodge* recognized a "tension" between its holding and this Court's recent cases, but it declined to overturn its earlier precedents without a "directly applicable Supreme Court holding." *Id.* at 384. The Fourth Circuit then relied on *Dodge* to resolve Mr. Enyinnaya's case in a short unpublished opinion.

This Court's guidance is needed to clarify that state breaking or entering crimes that do not categorically present a risk of violent confrontation and do not even require entry are not violent felonies. This Court should grant certiorari and reverse.

In the alternative, the United States has recently agreed in light of *Wooden v. United States,* 142 S. Ct. 1063 (2022), that a jury—not a sentencing judge—must find that a defendant committed his ACCA predicates "on occasions different from one another." This Court should vacate the Fourth Circuit's opinion and remand for that court to consider in the first instance whether the failure to follow that procedure in Mr. Enyinnaya's case was plain error.

STATEMENT

A. Statutory Background

ACCA has drastic consequences for criminal defendants. Although violations of the federal felon-in-possession statute, 18 U.S.C. § 922(g), are normally subject to a maximum penalty of ten years of imprisonment and no mandatory minimum, the

[1] This Court rejected Mr. Dodge's petition for a writ of certiorari (Sup. Ct. Doc. No. 20-6941).

Act provides that district courts must sentence defendants with three prior convictions for "violent felonies" to a term of at least fifteen years. 18 U.S.C. § 924(e)(1).[2]

A violent felony under the ACCA includes any crime punishable by more than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or is "burglary, arson, or extortion, [or] involves the use of explosives." *Id.* § 924(e)(2)(B). These provisions are known as the "force clause" and the "enumerated-offense clause." A third clause, the residual clause, has been struck down as unconstitutionally vague. *Johnson* v. *United States*, 576 U.S. 591, 606 (2015). Because North Carolina's breaking or entering statute does not categorically require the "use, attempted use, or threatened use of physical force against the person of another," *see Johnson* v. *United States*, 559 U.S. 133, 140 (2010), it is a violent felony only if it qualifies under the enumerated-offense clause as generic "burglary."

To determine whether a crime qualifies as a predicate felony under the ACCA, courts apply the "categorical approach," which focuses on "the fact of conviction and the statutory definition of the prior offense." *Taylor*, 495 U.S. at 602. Under that approach, the court "focus[es] solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the

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[2] Congress recently increased the statutory sentencing range for a non-ACCA-enhanced violation of Section 922(g) from 0-10 years to 0-15 years. *See* Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 at § 12004. Mr. Enyinnaya committed his Section 922(g) offense when the range was still 0-10 years.

particular facts of the case." *Mathis*, 136 S. Ct. at 2248. The prior state conviction is a proper ACCA predicate only if it is defined more narrowly than, or has the same elements as, the generic federal crime. *Descamps* v. *United States*, 570 U.S. 254, 261 (2013). If, however, the prior offense sweeps more broadly than the generic crime, it cannot serve as a predicate regardless whether the defendant actually committed the offense in its generic form. *Id.*

This petition asks whether North Carolina breaking or entering is a categorical match for generic burglary. Because the ACCA does not define "burglary," this Court in *Taylor* determined that generic burglary has "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. In *United States* v. *Stitt*, this Court explained that generic burglary encompasses only statutes that criminalize "burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation" because such statutes "more clearly focus upon circumstances where burglary is likely to present a serious risk of violence." 139 S. Ct. 399, 407 (2018).

North Carolina breaking or entering encompasses "break[ing] or enter[ing] any building with the intent to commit any felony or larceny." N.C. Gen. Stat. § 14-54(a). The statute defines "building" as "any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." *Id.* § 14-54(c).

B. Facts and Procedural History

The facts related to Mr. Enyinnaya's conviction and sentencing are simple and undisputed. In February, 2017 a grand jury sitting in the Eastern District of North Carolina indicted him on one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Mr. Enyinnaya pleaded guilty. He did not admit that he had three prior ACCA predicate convictions committed "on occasions different from one another."

At sentencing, the parties disputed whether Mr. Enyinnaya was an Armed Career Criminal. He contended that his prior convictions for North Carolina breaking or entering were not "violent felonies" under ACCA. The district court overruled Mr. Enyinnaya's objection and sentenced him as an Armed Career Criminal.

The district court then sentenced him to the mandatory minimum fifteen-year Armed Career Criminal sentence. Without the enhancement, Mr. Enyinnaya's statutory maximum sentence would have been ten years. Mr. Enyinnaya timely appealed to the Fourth Circuit.

The Fourth Circuit, relying on its published decision in *United States v. Dodge,* 963 F.3d 379 (4th Cir. 2020), affirmed his sentence. Pet. App. 1a. It then denied a timely petition for rehearing en banc. Pet. App. 7a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION IS WRONG AND CONTRAVENES THIS COURT'S DECISIONS IN *STITT, TAYLOR,* AND *MATHIS* BECAUSE IT COUNTS AS A VIOLENT FELONY A BREAKING OR ENTERING STATUTE THAT INCLUDES BREAKING INTO STRUCTURES AND VEHICLES THAT HOUSE PROPERTY AND NOT PEOPLE

This Court should grant review because the Fourth Circuit has decided an important federal question in a way that conflicts with relevant decisions of thisw Court. Sup. Ct. R. 10(c).

When determining whether an offense qualifies as a burglary under the ACCA, *where* that offense can take place matters. Congress saw burglary as an "inherently dangerous crime" because it "creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Stitt*, 139 S. Ct. at 406 (quoting *Taylor*, 495 U.S. at 588). Generic burglary "includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation" precisely because breaking into such structures "runs a similar or greater risk of violent confrontation." *Id.* at 403-404, 406. By contrast, the statutes analyzed in *Mathis* and *Taylor* were categorically overbroad because they included burglary of structures and vehicles that are "ordinary boats and vessels * * * (and railroad cars often filled with cargo, not people)" (*Taylor*) and vehicles that are "used for storage or safekeeping" (*Mathis*), which did not present the same risk of violent confrontation. *Stitt*, 139 S. Ct. at 407.

By entrenching its pre-*Stitt* and *Mathis*-precedent, the Fourth Circuit ignored the clear command of those cases and failed to wrestle with the fact that North Carolina breaking or entering—like the statutes at issue in *Taylor* and *Mathis*—includes breaking into structures and vehicles that house property and no people. Its conclusion that *Mathis* and *Stitt* do not represent "superseding contrary decisions" of this Court that require reconsideration of prior precedent contravenes those decisions and diverges from the holdings of its sister circuits, who have faithfully applied *Stitt*, *Mathis*, and *Taylor* to arrive at the conclusion that statutes that allow for conviction based on burglary of structures and vehicles that house only property and no people are categorically broader than generic burglary and are not violent felonies.

A. The Fourth Circuit ignored the clear command of this Court's precedents.

Burglary, for purposes of the ACCA, cannot be committed just anywhere. ACCA burglary is "an unlawful or unprivileged entry into, or remaining in, *a building or other structure*, with intent to commit a crime." *Taylor*, 495 U.S. at 597 (emphasis added). State burglary statutes are broader than this generic definition if they include "places, such as automobiles and vending machines, other than buildings." *Id.* at 599. In *Mathis*, this Court noted that the Iowa burglary statute at issue "cover[ed] more conduct than generic burglary does" because it "reache[d] a broader range of places"—namely, "any building, structure, *[or] land, water, or air vehicle*"—than what *Taylor*'s definition would allow. *Mathis*, 136 S. Ct. at 2250.

In *Stitt*, this Court clarified that generic burglary's locational element is not limited to "building[s]" in the ordinary sense. Instead, *Stitt* held that generic burglary also includes "burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." *Stitt*, 139 S. Ct. at 403-404. Generic burglary encompasses certain vehicles, this Court reasoned, because "break[ing] into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily used for lodging" runs the same risk of "violent confrontation" between the intruder and potential occupants that prompted Congress to include burglary among the ACCA's enumerated offenses in the first place. *Id.* at 406. *Stitt* underscored that the touchstone of generic burglary's locational element is whether committing the offense in a particular structure "present[s] a serious risk of violence" to another person, *id.* at 407, a principle echoed in cases before and since *Stitt*. *See Quarles* v. *United States*, 139 S. Ct. 1872, 1879 (2019) ("Congress 'singled out burglary' because of its 'inherent potential for harm to persons.'") (quoting *Taylor*, 495 U.S. at 588); *James* v. *United States*, 550 U.S. 192, 203 (2007), *overruled by Johnson* v. *United States*, 576 U.S. 591 (2015) ("The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate."); *Taylor*, 495 U.S. at 588 ("The fact that an offender enters a building to commit a crime often creates the

possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.").

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

Thus, in confirming that the scope of generic burglary's "building or other structure" element hinges on the risk of violent confrontation with another person, *Stitt* also clarified that this same element does not necessarily include burglaries committed in *any* building or vehicle—especially those where the likelihood of violent confrontation is virtually nonexistent. *See id.* (explaining that the burglary statute at issue in *Taylor* was broader than generic burglary because its scope was

not limited to "circumstances where burglary is likely to present a serious risk of violence").

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

And the Fourth Circuit will not fix its error without this Court's intervention. As it held in *Dodge*, it will not change its view regarding North Carolina breaking or entering without a "directly applicable Supreme Court holding." 963 F.3d at 384. Thus, further percolation will not resolve this problem. This Court's review is the only method to correct the Fourth Circuit's misreading of *Taylor, Mathis,* and *Stitt.*

B. The Fourth Circuit's decision departs markedly from how other federal courts of appeals analyze burglary offenses under the ACCA post-*Stitt*.

The Fourth Circuit's failure to analyze whether North Carolina breaking or entering's locational element encompasses only those structures in which burglary presents a "risk of violent confrontation," *see Stitt*, 139 S. Ct. at 406, also represents a marked departure from how other courts of appeals compare state offenses to generic burglary under the ACCA post-*Stitt*.

Start with *United States* v. *Jones*, 951 F.3d 1138 (9th Cir. 2019). There, the Ninth Circuit held that a defendant's prior Colorado conviction for second degree burglary of a dwelling was a predicate offense under the ACCA because it "cover[ed] only conduct within the generic offense of burglary as defined by the Supreme Court in *Stitt*." *Id.* at 1141. The court made clear that the burglary conviction at issue was no broader than generic burglary only because the defendant had been specifically convicted of the standalone offense of burglarizing a *dwelling*, and a "dwelling" was limited by state law to include only "building[s] which [are] used, intended to be used, or usually used by a person for habitation." *Id.* Because second degree burglary of a dwelling was so limited, it could not cover a structure used only "'for the storage or safekeeping' of property," and therefore was not overbroad. *Jones*,

951 F.3d at 1141 (quoting *Stitt*, 139 S. Ct. at 407). The habitation requirement ensured that the statute solely encompassed structures in which the likely presence of an occupant enhanced the "risk of violent confrontation." *Stitt*, 139 S. Ct. at 406.

The court made plain it would have reached the opposite conclusion had the defendant instead been convicted of general second degree burglary, which state law defined in relevant part as "break[ing] an entrance into, or enter[ing], or remain[ing] unlawfully in a *building* or occupied structure." *Jones*, 951 F.3d at 1140 (emphasis added). Because the statutory definition of "building," includes "structures that are designed to shelter only property," it covered "significantly more than the generic [burglary] element of 'building or other structure.' " *Id.* at 1141.

Consider next *Greer* v. *United States*, 938 F.3d 766 (6th Cir. 2019). In that case, the Sixth Circuit held that an Ohio aggravated burglary statute that "cover[ed] an expansive array of structures" nonetheless aligned with the generic definition of burglary because the additional statutory requirement that a person either be "present" or "likely to be present" in the burglarized structure "restrict[ed] the statute's scope to only those structures that carry an increased risk of a violent encounter between perpetrator and occupant." *Id.* at 775, 779. The Sixth Circuit cited this Court's decisions in *Stitt*, *Mathis*, and *Taylor* for the proposition that a "burglary statute is broader than generic burglary if it (1) covers a multitude of location types, including vehicles, and (2) does not limit its coverage to even remotely residential uses." *Id.* at 776. It then noted that this proposition could be

explained in large part by *Stitt*'s focus on "circumstances where burglary is likely to present a serious risk of violence." *Id.* at 777 (quoting *Stitt*, 139 S. Ct. at 407). And because it extended "only to habitations 'in which at the time [of the burglary] any person is present or likely to be present,' " the Ohio statute at issue targeted the "core of the generic offense of burglary" and those instances, as emphasized in *Stitt*, "where the risk of violence is the greatest." *Id.*

The Eighth Circuit reached a similar conclusion in *United States* v. *Sims*, 933 F.3d 1009 (8th Cir. 2019), one of the two cases this Court addressed in *Stitt*. On remand, the Eighth Circuit considered whether the fact that an Arkansas burglary statute "might cover a car in which a homeless person occasionally sleeps" meant that it swept more broadly than generic burglary. *Id.* at 1013 (quoting *Stitt*, 139 S. Ct. at 407-08). Relying on "*Stitt*'s straightforward focus on the potential for violent confrontation," the court decided that the Arkansas statute did not. *See id.* at 1013, 1015 (holding that the statute matched generic burglary and therefore qualified as a violent felony under the ACCA). The Eighth Circuit emphasized that, "as *Stitt* recognizes, a statute that prohibits breaking and entering into *any* vehicle does not qualify as generic burglary." *Id.* at 1014 (emphasis in original). Such a statute, the court noted, would encompass vehicles and other structures that merely stored property, thus moving beyond generic burglary's ambit. *See id.* (highlighting the distinction between Arkansas's residential burglary statute, which matched generic burglary, and its more expansive breaking and entering statute that encompassed structures "not used for residential purposes"). But the Arkansas burglary statute

at issue was more limited: It "applie[d] only to vehicles in which someone lives or that are customarily used for overnight accommodation," and therefore, in accordance with *Stitt*, "addresse[d] the risk of violence that concerned Congress when it passed the ACCA." *Id.* at 1015.

And then there is *United States* v. *Montgomery*, 974 F.3d 587 (5th Cir. 2020). In that case, the Fifth Circuit rejected the contention that Louisiana simple burglary of an inhabited dwelling "cover[ed] more places than does the 'building or structure' definition of generic burglary." *Id.* at 592-593. To the contrary, the court suggested, the Louisiana statute at issue was "arguably narrower than generic burglary" because it required that the building or structure where the offense occurred be "used in whole or in part as a home or place of abode." *Id.* at 593. Put another way, "because the place burglarized must be one where a person lives," the statute targeted offenses where there was a "greater 'possibility of a violent confrontation between the offender and an occupant' than in a generic burglary." *Id.* (quoting *Taylor*, 495 U.S. at 588). And given this focus on the risk of violence, the parallels to *Stitt* could not be clearer. *See Stitt*, 139 S. Ct. at 406-407 (recognizing that burglary is an "inherently dangerous crime" because of the likelihood of "violent confrontation").

In sum, these cases collectively demonstrate that, when comparing an offense to generic burglary, other courts of appeals faithfully apply *Stitt*'s command by considering whether an offense's locational element "focus[es] upon circumstances where burglary is likely to present a serious risk of violence." *Stitt*, 139 S. Ct. at

407. The Fourth Circuit's failure to do the same contravenes *Stitt*, *Taylor*, and *Mathis*, and requires this Court's intervention.

II. THE FOURTH CIRCUIT'S DECISION CONTRAVENES *TAYLOR* FOR ANOTHER REASON, NAMELY THAT IT COUNTS AS A VIOLENT FELONY A STATUTE THAT DOES NOT REQUIRE ENTRY, AN ESSENTIAL ELEMENT OF GENERIC BURGLARY

North Carolina breaking or entering is distinct from generic burglary in yet another way: It can be completed without entry. In *Taylor*, this Court defined generic burglary as having "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598. Thus, if a statute permits conviction without requiring an entry, it cannot be a match for generic burglary. *See Descamps*, 570 U.S. at 277 ("Because generic unlawful entry is not an element, or an alternative element, of [California Penal Code Ann.] § 459, a conviction under that statute is never for generic burglary."). To qualify as generic burglary, a statute must require entry.

But North Carolina breaking or entering can be completed by breaking alone. The plain text of Section 14-54(a) permits conviction on a finding of *either* breaking or entering. N.C. Gen. Stat. § 14-54(a) (emphasis added). And the North Carolina Supreme Court has explained that "by the disjunctive language of [14-54(a)], the state meets its burden by offering substantial evidence that defendant either 'broke' or 'entered' the building with the requisite unlawful intent." *State* v. *Myrick*, 291 S.E.2d 577, 579 (N.C. 1982). *See also State* v. *Jones*, 157 S.E.2d 610, 611 (N.C. 1967) (per curium) (holding that breaking a window with the 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").

North Carolina courts of appeals continue to permit breaking or entering convictions based solely on a finding of breaking. *See State* v. *Watkins*, 720 S.E.2d 844, 850 (N.C. Ct. App. 2012) (vacating a first-degree burglary conviction and entering judgment on the lesser included offense of breaking or entering because the State presented evidence of breaking but not of entry); *State* v. *Lucas*, 758 S.E.2d 672, 678 (N.C. Ct. App. 2014) ("Although * * * the State failed to prove that either Defendant actually entered the home * * * the entry of judgment on felonious breaking or entering is appropriate."). North Carolina courts do not require proof of entry to satisfy felonious breaking or entering. Because conviction under North Carolina breaking or entering does not require proof of entry, it is broader than generic burglary.

North Carolina's breaking or entering statute permitting conviction solely on proof of breaking, while rare, is not unique. Arkansas and Iowa also have statutes whose text can be satisfied by proof of breaking alone. *See* Ark. Stat. Ann § 5-39-202(a) ("A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he or she breaks or enters into any [enumerated structure or vehicle]."); Iowa Code Ann. § 713.1 ("[O]r any person having such intent [to commit a felony, assault, or theft therein] who breaks an occupied structure, commits burglary."). These statutes have been deemed categorically broader than burglary, albeit on other grounds. *See Mathis*, 136 S. Ct. at 2257 ("Because the

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

Courts considering attempted burglary statutes provide more guidance. Like North Carolina breaking or entering, these statutes do not require entry. Indeed, the North Carolina Supreme Court has described North Carolina breaking or entering in terms strikingly similar to attempt, finding that when defendants "opened the door[,] although [defendants] had not entered" the building, felonious breaking or entering "was complete upon the finding by the jury of the overt act and felonious intent which was amply supported by the evidence." *State* v. *Nichols*, 150 S.E.2d 21, 22 (N.C. 1996). Breaking, but not entering, is typically categorized as attempted burglary or attempted breaking and entering. *See, e.g.*, *Commonwealth* v. *Cotto*, 752 N.E.2d 768, 772 (Mass. App. Ct. 2001) ("[A]ssume in the case at bar that the defendant had broken the window, but upon seeing [a witness], dropped the infernal device and ran. In this scenario, he may be found guilty of attempted breaking and entering as well as attempted arson, but not of arson or breaking and entering."); *People* v. *Austin*, 799 P.2d 408, 409 (Colo. App. 1990) (finding that "[t]ampering with doors" without entry is either attempted burglary or attempted trespass, depending on the intent); *State* v. *Ison*, 744 P.2d 416, 418 (Alaska Ct. App.

1987) (finding that using a credit card to jimmy a lock but never physically entering was not burglary because there was no entry; instead the defendant committed only attempted burglary); *State* v. *McCurdy*, 487 P.2d 764, 764 (Ariz. App. Ct. 1971) (upholding conviction where "[t]he court ruled as a matter of law there was insufficient proof of actual entry but held there was sufficient proof to go to the jury on the included offense of attempted burglary").

Attempted burglary is not a violent felony under the ACCA. This Court, in *James*, 550 U.S. 192, explained that Florida attempted burglary "is not 'burglary' because it does not meet the definition of burglary under ACCA that this Court set forth in *Taylor v. United States*." *James*, 550 U.S. at 197[3]. This was so because Florida attempted burglary could be satisfied when a defendant committed an act towards commission of burglary but fell short of "entering or remaining in a structure or conveyance with the intent to commit an offense therein." *Id.*; Fla. Stat. §§ 810.02(1), 777.04(1); *see James*, 550 U.S. at 227 (Scalia, J., dissenting) ("the full extent of the risk that burglary poses—the entry into the home that makes burglary such a threat to the physical safety of its victim—is necessarily absent in attempted burglary, however 'attempt' is defined").

The Second, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, analyzing attempted burglary statutes, have held that those statutes similarly do not qualify as enumerated burglary. *See United States* v. *Evans*, 924 F.3d 21, 24 (2d Cir. 2019)

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

(defendant's New York attempted burglary had "qualified as a violent felony only under ACCA's voided residual clause"); *United States* v. *Thomas*, 2 F.3d 79, 80 (4th Cir. 1993) (holding that New Jersey's attempted burglary statute "does not contain the elements required for 'burglary' as that term is used in 924(e)" and therefore could not qualify as enumerated burglary); *United States* v. *Martinez*, 954 F.2d 1050, 1053 (5th Cir. 1992) (explaining that Texas's attempted burglary statute "does not require that the offender enter (or remain in) a building or structure" and therefore cannot qualify as enumerated burglary); *Van Cannon* v. *United States*, 890 F.3d 656, 658 (7th Cir. 2018) (explaining that '[t]he Iowa attempted burglary was a residual-clause offense and no longer counted toward Van Cannon's ACCA total" following *Johnson*); *United States* v. *Smith*, 645 F.3d 998, 1003 (8th Cir. 2011) (Minnesota attempted burglary could only qualify as a violent felony under the residual clause because "[a]ttempted burglary is not an enumerated offense"); *United States* v. *Strahl*, 958 F.2d 980 (10th Cir. 1992) (holding that Utah's attempted burglary statute did not qualify as enumerated burglary because the Tenth Circuit could "not conclude that Congress intended implicitly to include attempted burglary as a violent offense when it specified burglary as a violent felony under § 924(e)(2)(B)(ii)").

Attempted burglary is not a qualifying violent felony under the ACCA. And because North Carolina breaking or entering permits conviction for conduct equivalent to generic attempted burglary, North Carolina breaking or entering also cannot be a qualifying violent felony under the ACCA.

III. THIS ISSUE IS IMPORTANT AND RECURS FREQUENTLY

The Fourth Circuit's holding that North Carolina breaking or entering is a categorical match for generic burglary and therefore a violent felony under the ACCA is an important and recurring issue warranting this Court's review.

North Carolina breaking or entering continues to be used to drastically enhance prison sentences under the ACCA, despite being broader than generic burglary on two grounds. This erroneous designation has ramifications well beyond Mr. Enyinnaya's case. Breaking or entering is *the most common* felony offense of conviction in North Carolina. *See* N.C. Judicial Branch, Felony Case Activity Report FY 2019–20 (2020).[4] Indeed, more than 4,300 cases involving a felony count of breaking or entering were resolved by guilty pleas between July 2019 and June 2020, *id.*, and another 5,094 breaking or entering cases were resolved in the same manner the prior year, *see* N.C. Judicial Branch, Felony Case Activity Report FY 2018–19 (2019).[5] Consequently, the Fourth Circuit's disregard of this Court's ACCA precedents places tens of thousands of individuals with a North Carolina breaking or entering conviction on their record one step closer to being deemed an armed career criminal. And as the Fourth Circuit made a point of emphasizing in *Dodge*, the risk that these same individuals will be subject to the ACCA's drastic sentencing enhancement is hardly speculative. *See Dodge,* 963 F.3d at 382-83 (citing at least fifteen recent opinions in which the Fourth Circuit has affirmed a

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4 https://www.nccourts.gov/documents/publications/felony-case-activity-report.

5 https://www.nccourts.gov/documents/publications/felony-case-activity-report.

sentence under the ACCA involving North Carolina breaking or entering as a qualifying predicate offense).

The Fourth Circuit's failure to follow this Court's precedents, and its departure from the analysis of its sister circuits in the wake of those precedents, demands this Court's intervention to ensure that unlawful ACCA designations do not enhance the sentences of those who are not armed career criminals.

IV. IN THE ALTERNATIVE, THIS COURT MAY WISH TO SUMMARILY REMAND THIS CASE FOR THE FOURTH CIRCUIT TO RECONSIDER IT IN LIGHT OF *WOODEN V. UNITED STATES.*

In *Wooden v. United States,* the petitioner asked this Court to resolve what Congress meant by "occasions different from one another." But Mr. Wooden "did not raise" the more foundational question of who—the judge or the jury—gets to resolve that question. *Wooden*, 142 S. Ct. at 1068 n. 3.

In light of *Wooden,* however, the United States has now taken a position on that question. The United States has filed notices in two cases of which undersigned counsel is aware in which it reversed its longstanding position on this issue and states that

> In the light of the "multi-factored" and "holistic" inquiry required by *Wooden*, 142 S. Ct. at 1070–71, the Solicitor General has determined that a jury must find, or a defendant must admit, that a defendant's predicates under the Armed Career Criminal Act were committed on occasions different from one another.

Notice, *United States v. Brown*, 4th Cir. No. 21-4253, D.E. 31; *see also* Notice, *United States v. Hadden*, 4th Cir. No. 19-4151, D.E. 57. The United States further

contends that any defendant requesting relief for this error must satisfy either plain or harmless error review. *Id.*

Mr. Enyinnaya did not admit that his predicate convictions occurred on occasions different from one another. And a jury did not find it. He also did not raise this issue in the district court. Thus, in light of the United States' position, this Court should vacate the 4th Circuit's opinion and summarily remand to the 4th Circuit to consider in the first instance whether his ACCA sentence is plainly erroneous on these grounds.

CONCLUSION

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

Respectfully submitted,

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