No. 05-9264

In the Supreme Court of the United States

ALPHONSO JAMES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's prior felony conviction for the Florida offense of attempted burglary of a dwelling qualifies as a "violent felony" under 18 U.S.C. 924(e) (2000 & Supp. II 2002).

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OPINION BELOW

The opinion of the court of appeals (J.A. 44-54) is reported at 430 F.3d 1150.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2005. The petition for a writ of certiorari was filed on February 14, 2006, and was granted on June 12, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out at Pet. Br. 2-4.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 71 months of imprisonment. The government appealed the sentence, and petitioner cross-appealed. The court of appeals vacated petitioner's sentence and remanded with instructions that the district court impose a sentence pursuant to the Armed Career Criminal Act of 1984 (ACCA), as amended, 18 U.S.C. 924(e) (2000 & Supp. II 2002). J.A. 45.

1. Congress enacted the ACCA in 1984 to assist the States in addressing the threat to public safety posed by career criminals. *Taylor* v. *United States*, 495 U.S. 575, 581 (1989). The law provided a 15-year mandatory minimum sentence for possession of a firearm by a felon who had three previous convictions for robbery or burglary. Pub. L. No. 98-473, Tit. II, §§ 1801-1803, 98 Stat. 2185 (codified at 18 U.S.C. App. 1202 (1982 & Supp. II 1984)). The crime of possession of a firearm by a convicted felon ordinarily carries a maximum term of imprisonment of 10 years. See 18 U.S.C. 924(a)(2). Congress chose robbery and burglary as the offenses that would trigger the sentence enhancement because "a 'large percentage' of crimes of theft and violence 'are committed by a very small percentage of repeat offenders,' and * * * robbery and burglary are the crimes most frequently committed by these career criminals." *Taylor*, 495 U.S. at 581 (quoting H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1 (1984)). The statute defined "burglary" as a "felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to en-

gage in conduct constituting a Federal or State offense." 18 U.S.C. App. 1202(c)(9) (Supp. II 1984).

Concerned about the limited reach of the law, Congress two years later "expanded the predicate offenses triggering the sentence enhancement," *Taylor*, 495 U.S. at 582, to promote "a greater sweep and more effective use of this important statute," *id.* at 583 (quoting 132 Cong. Rec. 7697 (1986)). In particular, Congress amended the ACCA by providing enhanced penalties for firearms offenders with three previous convictions "for a violent felony or a serious drug offense." Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402(a), 100 Stat. 3207-39 (18 U.S.C. 924(e)(1) (1982 & Supp. IV 1986)). Congress defined the term "violent felony" to include any felony that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). "Congress singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense, both in 1984 and in 1986, because of its inherent potential for harm to persons." *Taylor*, 495 U.S. at 588.

In *Taylor*, this Court held that "any crime, regardless of its exact definition or label," is a generic "burglary" within the meaning of the ACCA if it "ha[s] the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to com-

mit a crime." 495 U.S. at 599. Recognizing that state statutes defined the offense of burglary differently, the Court adopted a "categorical approach" to determining whether a conviction under a state statute constitutes generic "burglary." Under that approach, the Court explained, sentencing courts "generally" should "look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602.

Thus, if a state statute precisely corresponds with generic burglary or is narrower, a conviction under it necessarily qualifies as "burglary" for purposes of the ACCA. And if a state statute sweeps more broadly to cover some conduct that does not constitute generic burglary, such as a statute that proscribes unprivileged entry into a building or a vehicle, a sentencing court, under what some courts have characterized as a "modified" categorical approach, could consult "the charging paper and jury instructions" to determine whether the defendant was in fact convicted of generic burglary. *Taylor*, 495 U.S. at 602. The Court also pointed out that, regardless of whether a particular conviction was for "generic burglary," *id.* at 600, the government "remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another' under § 924(e)(2)(B)(ii)," *id.* at 600 n.9.

In *Shepard* v. *United States*, 544 U.S. 13 (2005), this Court applied *Taylor*'s modified categorical approach to a prior conviction based on a guilty plea and held that, in considering whether a burglary conviction under a non-generic state statute qualifies as an ACCA predicate, the sentencing court is limited to "the charging document, the terms of a plea agreement or transcript of

colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." 544 U.S. at 26. Information in police reports or complaint applications that are not otherwise part of the charging instrument or the judicial proceedings may not be considered because that information is "too far removed from the conclusive significance of a prior judicial record." *Id.* at 25.

2. On January 31, 2003, in Fort Myers, Florida, police officers conducted a traffic stop of petitioner's vehicle. The officers smelled burning marijuana and conducted a search of the vehicle, in which they discovered a .380 caliber semi-automatic pistol and .380 caliber ammunition. 1/13/04 Tr. (Change of Plea) 15-16. On June 25, 2003, petitioner was charged with one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e) (2000 & Supp. II 2002). J.A. 14-15. The indictment listed three prior felony convictions: (1) Attempted Burglary of a Dwelling, in violation of Florida Statutes, Sections 810.02 and 777.04 (1993); (2) Possession of Cocaine, in violation of Florida Statutes, Section 893.13 (Supp. 1996), and Trafficking in Illegal Drugs, in violation of Florida Statutes, Section 893.135 (Supp. 1996); and (3) Trafficking in Cocaine, in violation of Florida Statutes, Section 893.135 (Supp. 1996). J.A. 14-15. On January 9, 2004, the United States filed a Notice of Penalties, Elements and Facts, reiterating that the government alleged that petitioner was an armed career criminal, listing petitioner's predicate violent felony and drug trafficking crimes, and indicating that petitioner was facing a "[m]andatory minimum term of imprisonment of fifteen years to life

without parole." Notice of Penalties, Elements and Facts 1.

Petitioner pleaded guilty to the federal felon-in-possession charge, based on his possession of a .380 caliber semi-automatic pistol and ammunition. At the Change of Plea hearing on January 13, 2004, the district court told petitioner that "in order for the Title 18, Section 924, Subsection (e) sentencing enhancement to apply, you must have three prior convictions for a violent felony or serious drug offense committed on occasions different from one another." 1/13/04 Tr. 12-13. The court read petitioner's prior felony convictions to him, including "attempted burglary of a dwelling in violation of Florida Statutes, Section 810.02 and 777.04, a crime punishable by imprisonment for a term exceeding one year, in the Circuit Court, Twentieth Judicial Circuit in and for Lee County, Florida, in the State of Florida versus Alphonso James, Case Number 94-2197-CF, on June the 3rd, 1997." 1/13/04 Tr. 14-15. After the court recited petitioner's prior felony convictions and the facts of his pending felon-in-possession charge, petitioner agreed that "all [of the listed prior convictions] occurred" (*id.* at 14), and he pleaded guilty. *Id.* at 18.

3. The probation office recommended that petitioner be sentenced as an armed career criminal under the ACCA based on the three prior convictions listed in the indictment. Gov't C.A. Br. 3; PSR para. 75. As relevant here, in 1994, petitioner pleaded nolo contendere in a Florida state court to one count of attempted burglary of a dwelling, which was occupied by a man and his 19-month-old daughter. After the man heard someone trying to open the door to his residence and went outside to investigate, petitioner threw a hammer through a closed window of the residence in order to gain entry. Adjudi-

cation of guilt was withheld, and the court placed petitioner on two years of probation. Petitioner was arrested for violation of that probation, however, had his probation revoked, and was adjudicated guilty in 1997 of the attempted burglary. PSR para. 29.

Petitioner objected "that his prior conviction * * * for Attempted Burglary of a Dwelling * * * should not be treated as a predicate offense" under the ACCA. Addendum to PSR 1. The Probation Office did not take a position on petitioner's objection but noted that if the district court were to agree, then petitioner would not qualify as an armed career criminal, and his sentencing range under the Guidelines would be 57 to 71 months. *Id.* at 2.

4. At sentencing on May, 10, 2004, the district court asked petitioner's counsel whether petitioner had "any factual objections to the contents of the presentence report." 5/10/04 Tr. 3. Petitioner's counsel responded, "No, sir." *Ibid.* At the same time, counsel noted that petitioner did have a legal objection "that two of [petitioner's] prior convictions, * * * the attempted burglary and one of his drug cases," should not be counted "for purposes of making a determination of whether [petitioner is] an armed career offender." J.A. 21. With respect to the attempted burglary conviction, petitioner argued that "under Florida law an attempted burglary just does not present the same danger or degree of danger as presented by a burglary." J.A. 23.

Relying on the Eleventh Circuit's decision in *United States* v. *Rainey*, 362 F.3d 733 (per curiam), cert. denied, 541 U.S. 1081 (2004), which held that attempted arson under Florida law is a "violent felony" for purposes of the ACCA, the district court overruled petitioner's legal objection:

> The issue is whether the defendant's conviction for the attempted burglary of a dwelling constitutes a violent felony within the meaning of Section 924(e). It is clear that the Florida burglary statute does satisfy 924(e) when analyzed under the case of [*Taylor* v. *United States*, 495 U.S. 575 (1990)]; and there's been no argument to the contrary there. The only issue is whether an attempted burglary is a qualifying felony conviction.
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> * * * * *
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> It seems to me that the Eleventh Circuit [in *Rainey*] has essentially spoken; that if you have an attempt to commit an enumerated felony, that is a violent felony, so the Court is going to overrule the defendant's objection and the Court does hold that the attempted burglary of the occupied dwelling set forth in Paragraph 29 [of the PSR] is a qualifying offense under the armed reoffender statute.

J.A. 33-34.

The district court nevertheless did not sentence petitioner as an armed career criminal, because it concluded that one of petitioner's prior drug convictions did not qualify. Instead, the court imposed a sentence of 71 months of imprisonment, under the then-mandatory Guidelines. 5/10/04 Tr. 75-76; J.A. 45-46.

5. The government appealed from the non-ACCA sentence, and petitioner cross-appealed. The court of appeals vacated petitioner's sentence and ordered the district court to sentence petitioner "in accordance with the ACCA." J.A. 45. The court of appeals agreed with the government that the district court erred by not counting petitioner's 1997 Florida state drug trafficking

conviction as a "serious drug offense" under the ACCA. J.A. 47-52. And the court rejected petitioner's contention that attempted burglary of a dwelling under Florida law is not a "violent felony" under the ACCA. J.A. 52-54. The court relied on three of its precedents for the proposition that because burglary under Florida law is a "violent felony" within the meaning of 18 U.S.C. 924(e)(2)(B)(ii), it follows that attempted burglary under Florida law is also a "violent felony" under the ACCA. J.A. 53-54 (discussing *United States* v. *Wilkerson*, 286 F.3d 1324, 1325-1326 (11th Cir.) (per curiam) (conspiracy to commit robbery is a violent felony because the object of the conspiracy presents a serious potential risk of injury to another), cert. denied, 537 U.S. 892 (2002); *Rainey*, 362 F.3d at 735-736 (attempted arson, like arson, presents a serious potential risk of injury to another); *United States* v. *Gunn*, 369 F.3d 1229, 1238 (11th Cir.) (per curiam) (attempted burglary is a "crime of violence" under United States Sentencing Guidelines (Guidelines) § 4B1.1(a)(2) because "[a]n uncompleted burglary does not diminish the potential risk of physical injury"), cert. denied, 543 U.S. 937 (2004)).

Based on those precedents, the court of appeals rejected petitioner's argument that attempted burglary "merely poses 'a risk of a risk,'" holding instead that attempted burglary "like an attempt to commit arson, presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of a 'violent felony.'" J.A. 54.

6. While petitioner's interlocutory petition for a writ of certiorari was pending in this Court, the case was remanded to the district court for resentencing. At the resentencing hearing on March 27, 2006, the district court denied petitioner's "renewed motion for a continu-

ance" pending this Court's action. 3/27/06 Tr. (Sent. on Remand) 7-8. Petitioner renewed his position "that the attempted burglary conviction is not a qualifying offense" under the ACCA. *Id*. at 10. Petitioner then advanced "an enlarged ground on the burglary offense," arguing for the first time that "it's not necessary [under Florida law] for one to actually enter into someone's property, or home" to be found guilty of burglary, *ibid*., and that "the fact that the Florida law would make somebody guilty for attempting to enter into the curtilage or area around someone's home or property[] would further take the attempted burglary section out of the definition [of] generic burglary." *Id*. at 10-11. Petitioner's counsel indicated that when petitioner was originally sentenced in 2004, counsel was "not aware" of "the issue regarding curtilage and the deficiency in Florida's burglary statute." *Id*. at 15. The district court overruled petitioner's renewed objection and new objection, concluding again that "attempted burglary is, indeed, a qualifying offense" under the ACCA. *Id.* at 17.

The district court then "adopt[ed] the factual statements set forth in the pre-sentence report, as well as the application of the guidelines as originally set forth in the presentence report." 3/27/06 Tr. 20. As a result, the court determined that, under 18 U.S.C. 924(e) (2000 & Supp. IV 2002), petitioner faced a mandatory minimum sentence of 180 months of imprisonment. 3/27/06 Tr. 20; see PSR paras. 75-76.

7. Petitioner again appealed to the Eleventh Circuit. *United States* v. *James*, No. 06-12204. On June 26, 2006, the court of appeals granted petitioner's motion to stay the briefing schedule in that case pending this Court's decision on the writ of certiorari from the court of appeals' prior decision.

SUMMARY OF ARGUMENT

The court of appeals correctly determined that attempted burglary of a dwelling under Florida law is a violent felony under the ACCA because, like the completed offense of burglary, the attempt "presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of a 'violent felony.'" J.A. 54. An attempt to commit a violent felony such as burglary necessarily presents a "serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), because the attempt itself creates a serious potential for the risk of violence that inheres in a completed burglary offense. Indeed, States prohibit attempts generally, and attempted burglary in particular, in part because of the potential that a defendant may otherwise complete the crime, thus producing the harmful consequence that the criminal law aims to prevent.

Even examining only the conduct constituting the attempt, attempted burglary of a dwelling under Florida law qualifies as a "violent felony." In Florida, the conduct necessary to establish the attempt creates an immediate risk of harm that is comparable to that posed by a completed burglary. Under Florida law, a person must intend to commit burglary and must commit an overt act *directed towards entry of the dwelling* to be guilty of attempted burglary of a dwelling. See *Jones* v. *State*, 608 So. 2d 797 (Fla. 1992). Mere presence in a neighborhood with burglary tools is not enough. Anyone who attempts to enter a dwelling to commit a burglary, but fails or is otherwise prevented from doing so, thus presents a serious risk of physical injury to another that is akin to the risk presented by a completed entry.

Petitioner contends (Pet. Br. 17-20) that the plain language of the ACCA demonstrates that Congress intended to exclude attempt crimes from the definition of "violent felony." That is incorrect. When Congress expanded the definition of violent felonies in 1986, it established two categories of violent crimes, those requiring use of force against persons, see 18 U.S.C. 924(e)(2)(B)(i) (a crime that "has as an element the use, attempted use, or threatened use of force against the person of another"), and those that do not require the use of force against persons but "otherwise involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii). Contrary to petitioner's contention, the reference to "attempted use" in the first definition does not trigger the inference that the expansive language in the "otherwise" clause of the second definition excludes attempts.

The canon of *ejusdem generis* is of no aid to petitioner. Petitioner contends (Pet. Br. 18-19) that burglary, arson, extortion, and the use of explosives—the four crimes or criminal conduct enumerated in Section 924(e)(2)(B)(ii)—are all completed offenses and thus the "otherwise" clause should be read to cover completed offenses only. But the criterion for inclusion as a violent felony under the "otherwise" clause is expressly specified in that clause, *viz.*, whether the crime "involves conduct that presents a serious potential risk of physical injury." Because the "otherwise" clause identifies the criterion that cabins its application, there is no need to resort to an interpretive canon as a means to import additional criteria into the statute.

Petitioner's contention (Pet. Br. 21-23) that Florida has departed from the generic burglary offense by defining a dwelling to include the enclosed space around

the dwelling (the curtilage) does not assist him, because the court of appeals rested its ruling on the "otherwise" clause, not on the ground that attempted burglary of a dwelling under Florida law is "generic" burglary. Moreover, the risk of violence presented by a breach or attempted breach of the enclosed curtilage is not categorically different from the risk presented by a breach or attempted breach of the dwelling itself.

Finally, petitioner's reliance on the canon of constitutional doubt and the rule of lenity is misplaced. Resolving whether a Florida attempted burglary offense is a "violent felony" requires purely legal determinations based on a comparison of the elements of attempted burglary with the definition of a violent felony under the ACCA. It does not even come close to constitutionally impermissible fact-finding about petitioner's prior conviction. And the rule of lenity is inapplicable because Section 924(e)(2)(B)(ii) is not ambiguous.

Even if this Court were to conclude that attempted burglary of a dwelling does not always present the requisite level of risk of injury, the crime surely does in many cases. Because petitioner has admitted (by virtue of his representation that he did not object to any facts in the PSR) that he threw a hammer through a window in a failed attempt to enter the dwelling, his prior conviction should qualify as a violent felony under whatever criteria this Court were to require under a modified categorical approach.

ARGUMENT

PETITIONER'S CONVICTION FOR ATTEMPTED BURGLARY OF A DWELLING UNDER FLORIDA LAW QUALIFIES AS A "VIOLENT FELONY" UNDER THE FEDERAL ARMED CAREER CRIMINAL ACT

Under the ACCA, a "violent felony" is defined as "any crime punishable by imprisonment for a term exceeding 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, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that the ACCA's reference to "burglary" includes "ordinary burglaries" (*id.* at 597)—namely, those that contain the elements of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598. The Court explained that Congress sought to count such burglaries as violent felonies because "[t]he 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." *Id.* at 588.

The court of appeals here correctly concluded that petitioner's prior conviction under Florida law for attempted burglary of a dwelling also counts as a "violent felony" under the ACCA's "otherwise" clause. The attempt, like the completed crime of burglary of a dwelling, "presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). That is true for two basic reasons. First, all completed burglaries of a

dwelling pose a serious risk of physical injury, and all attempted burglaries therefore pose a "serious *potential* risk" of such injury. The attempt holds the potential of completing the crime; thus, it poses the risks inherent in that crime. Second, even if the "otherwise" clause focuses only on risks in the conduct constituting the attempt, Florida law defines attempted burglary in a manner that requires conduct posing a serious risk of physical injury—indeed, the same risk posed by the completed offense. On either theory, petitioner's conviction is a violent felony under the "otherwise" clause. Petitioner's arguments to the contrary, whether based on an interpretation of Florida law or on canons of statutory construction, are unpersuasive.

A. Attempts To Commit Violent Felonies Are Violent Felonies Under The ACCA Because They Necessarily "Involve Conduct That Presents A Serious Potential Risk Of Physical Injury To Another"

An attempt to commit a violent felony such as burglary falls within the "otherwise" clause because attempt crimes, by their very nature, create a "serious potential" for the risk of harm that the completed offense concretely presents. In *Taylor*, this Court explained that "Congress singled out burglary" in the ACCA "because of its inherent potential for harm to persons." 495 U.S. at 588. The Court further explained that the enumeration of "burglary" "seemingly was meant simply to make explicit the provision's implied coverage of crimes such as burglary" by virtue of the "otherwise" clause. *Id.* at 589. In *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 (2004), this Court reiterated that burglary is a "classic example" of a "crime of violence" under 18 U.S.C. 16(b) because "burglary, by its nature, involves

a substantial risk that the burglar will use force against a victim in completing the crime."

Because there is a substantial or serious risk that a burglar will use physical force during a burglary, it follows that there is a "serious *potential* risk of physical injury to another" anytime someone *attempts* to commit a burglary. The perception that the attempt offense presents the potential for the harms that are associated with the completed offense is fundamental to the very rationale for punishing attempts. Indeed, "[O]ne important function served by the crime of attempt is to provide a basis whereby law enforcement officers may intervene in time to prevent a completed crime." Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 6.2, at 498 (2d ed. 1986) (LaFave). The formulation Congress chose to define a "violent felony"—a crime that "involves conduct that presents a serious *potential* risk of physical injury to another"—indicates that consideration should be given not only to the risks present at the time the defendant acted, but also to those risks that were likely to materialize had the defendant accomplished his objective. See *The American Heritage Dictionary of the English Language* 1417 (3d ed. 1992) (defining "potential" to mean "Capable of being but not yet in existence").

The ACCA's formulation thus supports the court of appeals' conclusion that an *attempt* to commit a violent felony (such as burglary of a dwelling) that presents a serious risk of physical injury to another is a violent felony itself.[1] See J.A. 54; cf. *United States* v. *Wilkerson*,

[1] Most jurisdictions today, including many federal courts, see *United States* v. *Joyce*, 693 F.2d 838, 841 (8th Cir. 1982), have adopted the Model Penal Code's approach to attempts. See LaFave § 6.2(d)(4), at 508. Under the Model Penal Code standard, "the requisite elements of

286 F.3d 1324, 1325 (11th Cir. 2002) ("[B]ecause robbery as defined by Florida law involves conduct that 'presents a serious potential risk of physical injury to another,' we conclude that a conspiracy that has as its object the offense of robbery likewise presents such a risk."), cert. denied, 537 U.S. 892 (2002).

The view that attempted violent felonies are violent felonies themselves is shared by the United States Sentencing Commission, which has construed the career offender enhancement, whose definition of "crime of violence" is virtually identical to the ACCA's definition of "violent felony," to apply to "the offenses of aiding and

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attempt are (1) an intent to engage in criminal conduct, and (2) conduct constituting a 'substantial step' towards the commission of the substantive offense which strongly corroborates the actor's criminal intent." *Joyce*, 693 F.2d at 841. See Model Penal Code § 5.01(1) (1962). As one court has explained, "[t]he problem faced by the drafters [of the Code] was that to punish as an attempt every act done to further a criminal purpose, no matter how remote from accomplishing harm, risks punishing individuals for their thoughts alone, before they have committed any act that is dangerous or harmful; yet, if the law punished only the very last act necessary to accomplish the criminal result, legal intervention would be delayed to a point at which it may well be too late to prevent harm." *United States* v. *Crowley*, 318 F.3d 401, 408 (2d Cir.), cert. denied, 540 U.S. 894 (2003). As explained in Part B, *infra*, Florida does not follow the Model Penal Code "substantial step" approach but specifically requires an overt act directed toward entry of the dwelling. Under either standard, an attempt to commit burglary presents a "serious potential risk of physical injury to another" because anytime a perpetrator who intends to commit burglary takes a substantial step towards commission of the offense, whether that step is directed toward entry (as Florida requires) or otherwise, there is a "serious potential" for completion of the burglary offense with its attendant risk of physical injury to another.

abetting, conspiring, and attempting to commit [crimes of violence]." Guidelines § 4B1.2(a), comment. (n.1).[2]

Congress's approach to attempt crimes similarly supports the court of appeals' decision. Congress has generally drawn no distinction between the completed crime and the attempt when setting the penalties for crimes. In the United States Code, the statutory punishment for a completed crime typically is identical to the punishment for an attempt.[3] The general rule that attempts

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[2] As then-Judge Breyer observed, "[t]he Commission, which collects detailed sentencing data on virtually every federal criminal case, is better able than any individual court to make an informed judgment about the relation between [a given crime] and the likelihood of accompanying violence." *Doe*, 960 F.2d at 225. That expertise led the *Doe* court to "give some legal weight to the Commission's determination" that possession of a firearm by a convicted felon was not a "crime of violence" under the Guidelines for purposes of determining that it was likewise not a "violent felony" under the ACCA. *Ibid.* (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). The Commission's view that an attempt to commit a crime of violence is itself a crime of violence supports the court of appeals' judgment that an attempted burglary of a dwelling should, under the "othwerwise" clause, be treated the same as the completed offense for purposes of the ACCA.

[3] In many instances, attempt is treated as an alternative theory for conviction of the statutory crime. See, *e.g.*, 18 U.S.C. 33(a) (setting 20 years' imprisonment as statutory penalty for anyone who willfully destroys a motor vehicle or "willfully attempts to do [so]"); 18 U.S.C. 751(a) (setting same maximum penalty for "whoever escapes or attempts to escape from the custody of the Attorney General"); 18 U.S.C. 1031(a) (setting 10 years' imprisonment as statutory penalty for anyone who "knowingly executes, or attempts to execute" scheme to defraud the United States); 18 U.S.C. 1956(a)(3) (money laundering maximum penalty the same for "[w]hoever * * * conducts or attempts to conduct" specified transactions). In other instances, Congress has created an attempt offense distinct from the completed offense, but it has still chosen to subject that offense to the same penalties. See, *e.g.*, 21 U.S.C. 846 ("Any person who attempts or conspires to commit any

and completed crimes are punished identically in the United States Code holds true for the few federal burglary or robbery crimes, where Congress has treated an attempt as an alternative theory for conviction of the statutory crime.[4] While Congress has not punished all attempts, its treatment of attempted burglary in particular settings as a crime equivalent to completed burglary (see 18 U.S.C. 2115, 2118(b)) reflects the notion that attempted burglary, like completed burglary, has the *potential* to produce serious violence.[5] Congress's

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offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[4] See 18 U.S.C. 2111 (robbery in maritime jurisdiction); 18 U.S.C. 2112 (robbery of United States property); 18 U.S.C. 2113-2115 (2000 & Supp. IV 2004) (bank or postal robbery or burglary); 18 U.S.C. 2118 (robberies and burglaries involving controlled substances); 18 U.S.C. 2119 (stealing motor vehicles with intent to cause death or serious harm); but see 18 U.S.C. 2117 (breaking or entering carrier facilities) (does not mention attempts); Indian Major Crimes Act, 18 U.S.C. 1153 (does not mention attempts)

[5] The prospect that an attempted burglary will produce serious violence is reflected in state codes. See, *e.g.*, N.Y. Penal Law § 125.25(3) (McKinney 1998) (person who commits or attempts to commit burglary and causes the death of another person in the course of the offense or of immediate flight therefrom is guilty of second-degree murder); Colo. Rev. Stat. § 18-3-102 (2005) (predicating first degree murder on the killing of a person during the commission of a burglary or attempted burglary or during immediate flight therefrom); Idaho Code § 18-4003(d) (2004) (first degree murder for murder committed in the perpetration or attempted perpetration of burglary); Tenn. Code Ann § 39-13-202(2) (2004) (first degree murder for killing another in the perpetration or attempt to perpetrate burglary); Conn. Gen. Stat. 53a-54c (2003) (person guilty of murder who commits or attempts to commit burglary and causes death of another person in the course of the crime or of flight therefrom). Many cases also reflect the serious potential for violence that attempted burglary presents. See, *e.g.*, *State* v.

approach to attempted burglary indicates that the crime poses potential risks that are sufficiently serious to bring it within the "otherwise" clause.[6]

Gray, No. 04AP-938, 2005 WL 2100595 (Ohio Ct. App. Sept. 1, 2005) (evidence established that the defendant fired two shots in rapid succession at an inhabited dwelling in response to inhabitants' verbal attempts to thwart attempted burglary); *Commonwealth* v. *Galindes*, 786 A.2d 1004 (Pa. Super. Ct. 2001) (the defendant fired shots after fleeing dwelling that he attempted to burglarize), appeal denied, 803 A.2d 733 (Pa. 2002) (Table); *People* v. *Simien*, 656 P.2d 698 (Colo. 1983) (attempted burglary of trailer prompted shoot-out that resulted in the deaths of a perpetrator and occupant).

[6] The Sentencing Guidelines envision that some attempts will not be punished as a completed crime. Section 2X1.1 provides that the calculation of the punishment for an attempt generally begins with the base offense level for the completed offense, "decrease[d] by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control." See § 2X1.1(b)(1). Section 2X1.1 does not apply, however, "[w]hen an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section"; instead, that other Guideline section's more specific sentencing provision prevails. See § 2X1.1(c). In these other Guidelines sections, attempts are punished less severely for some crimes (*e.g.*, compare § 2A1.1 & § 2A1.2 (murder base offense level is 43 or 38), with § 2A2.1 (attempted murder base offense level is 33 or 27)), but are punished no differently for others (*e.g.*, § 2A3.1 (sexual abuse and attempted sexual abuse base offense level is 30)). The Guidelines section for burglary, § 2B2.1, does not provide for attempts, so attempted burglary would be punished according to § 2X1.1, *supra*.

B. Attempted Burglary Of A Dwelling Under Florida Law Is A Violent Felony Under The ACCA Because It Presents A "Serious Potential Risk Of Physical Injury To Another"

Even if this Court does not read the "otherwise" clause to permit consideration of the prospective risks that an attempt crime presents, petitioner's prior conviction for attempted burglary of a dwelling under Florida law still qualifies as a violent felony. Florida has defined attempted burglary in a way that requires conduct that creates an immediate and serious risk of physical injury to another.

1. Florida Law Requires An Act Directed Toward Entry Of The Dwelling

Under Florida law, "[a] person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt." Fla. Stat. § 777.04(1) (1993). At the time of petitioner's offense, Florida defined burglary as:

> entering or remaining in a structure or conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

Fla. Stat. § 810.02(1) (1993). [7]

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[7] Florida further categorized burglaries into crimes of various degrees, classifying an armed burglary or a burglary that included an assault or battery as first degree burglary; a burglary of a dwelling or an occupied structure or conveyance as second degree burglary; and all other burglaries as third degree burglary. See Fla. Stat. § 810.02(2)-(4) (1993). Florida defined "dwelling" as "a building or conveyance of any

In *Jones* v. *State*, 608 So. 2d 797 (1992), the Florida Supreme Court applied the general attempt provision to the crime of attempted burglary.[8] The defendant there contended that his convictions for possession of burglary tools and attempted burglary of a dwelling, arising from the same criminal episode, violated the double jeopardy prohibition. The court rejected the defendant's argument because, while each crime required proof of intent to commit burglary, "the overt act necessary to convict of the burglary tool crime is not the same as the overt act required to prove attempted burglary." *Id.* at 799. To illustrate the different requirements, the court discussed the facts of another case, *Thomas* v. *State*, 531 So. 2d 708 (Fla. 1988), where the court held that the crime of possession of burglary tools requires proof of "an overt act toward the commission of the burglary which goes beyond merely thinking or talking about it." *Jones*, 608 So. 2d at 798. In *Thomas*, the defendant had been arrested after jumping over a fence and trying to run away wearing a pair of socks over his hands and carrying a screwdriver. The defendant admitted that he had entered the neighborhood to commit a burglary. The *Jones* court observed that "based on these facts, it is obvious that [the defendant] could not have been convicted of attempted burglary because there had been no

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kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof." *Id.* § 810.011(2).

[8] The Florida Supreme Court's construction of the attempt statute with respect to the crime of attempted burglary is authoritative. See, *e.g.*, *O'Brien* v. *Skinner*, 414 U.S. 524, 531 (1974) ("[I]t is not our function to construe a state statute contrary to the construction given it by the highest court of a State.").

overt act *directed toward entering or remaining in a structure or conveyance*." *Id.* at 799 (emphasis added).

Thus, a defendant who is in possession of burglary tools and who intends to commit a burglary, but is caught before he engages in some act directed toward entering or remaining in a particular dwelling, cannot be convicted of attempted burglary in Florida. That requirement of an act directed toward entry is consistent with Florida's additional requirement in burglary cases that "the *nature and character* of the building allegedly burglarized * * * must be both alleged and proven with particularity." *Jackson* v. *State*, 259 So. 2d 739, 741 (Fla. Dist. Ct. App. 1972), aff'd as modified, 281 So. 2d 353 (Fla. 1973). It is likewise consistent with a Florida statute applicable solely to attempted burglary, which provides that "[i]n a trial on the charge of attempted burglary, proof of the attempt to enter such structure or conveyance at any time stealthily and without the consent of the owner or occupant thereof is prima facie evidence of *attempting to enter with intent to commit an offense*." Fla. Stat. § 810.07(2) (2001) (emphasis added). See *Richardson* v. *State*, 922 So. 2d 331, 334 (Fla. Dist. Ct. App. 2006) (holding that evidence did not support jury instruction on attempted burglary because "[n]o version of the facts allowed for the conclusion that the perpetrator *had attempted entry* into the building and/or office and been foiled or interrupted") (emphasis added), review denied, No. SC06-717 (Fla. July 28, 2006); *Davis* v. *State*, 741 So. 2d 1213, 1214 (Fla. Dist. Ct. App. 1999) ("By pleading to attempted burglary, [the defendant] only admitted to *attempting to enter* with the intent to commit some offense once inside.") (emphasis added); *Davis* v. *State*, 730 So. 2d 837, 838 (Fla. Dist. Ct. App. 1999) ("unauthorized *attempted entry* into a con-

veyance" is an element of attempted burglary of a conveyance) (emphasis added).

Petitioner makes much of the apparent breadth of Florida's general attempt statute and cites numerous cases about attempted crimes other than attempted burglary. See Pet. Br. 23-28 & nn. 15-19. But he ignores the cases and the *prima facie* evidence statute discussed above that contrast attempted burglary with the crime of possession of burglary tools or otherwise specifically address the crime of attempted burglary and require conduct that brings the perpetrator to the threshold of the dwelling that he intends to burglarize. Indeed, petitioner does not cite a single case in which the Florida courts have upheld a conviction for attempted burglary of a dwelling in the absence of evidence that the defendant attempted to enter the dwelling. In fact, some cases hold even circumstantial evidence of an attempted entry insufficient to support a finding of attempted burglary. See, *e.g.*, *Nickell* v. *State*, 722 So. 2d 924, 925 (Fla. Dist. Ct. App. 1998) (holding that officer lacked probable cause to arrest the defendant for attempted burglary where the evidence—which consisted of a call to the police and a witness's statement that the defendant had broken the windows of an apartment complex laundry room with his head—"was equally consistent with a simple act of vandalism").

Thus, petitioner is incorrect in his assertion (Pet. Br. 21) that Florida has established a "low standard" for proving attempted burglary of a dwelling. And he is likewise incorrect in his assertion (Pet. Br. 27) that the Model Penal Code's "substantial step" standard is "more rigorous" than Florida's attempted burglary standard. Under the Model Penal Code's "substantial step" standard, conduct such as "reconnoitering the place contem-

plated for the commission of the crime" or "possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances" may not be ruled "insufficient as a matter of law" when "strongly corroborative of the actor's criminal purpose." Model Penal Code § 5.01(2). Because Florida law separately and expressly deals with the possession of burglary tools, and for attempted burglary requires an overt act directed toward entering the dwelling, it appears to require more than the Model Penal Code standard. Compare *Commonwealth* v. *Melnyczenko*, 619 A.2d 719, 721 (Pa. Super. Ct. 1992) (upholding attempted burglary conviction on the ground that "reconnoitering the area" while in possession of burglary tools was "substantial step"), appeal denied, 637 A.2d 288 (Pa. 1993) (Table), with *Jones*, *supra* (observing that defendant who was present in neighborhood and in possession of burglary tools that he intended to use to commit a burglary could not be convicted of attempted burglary in absence of overt act directed toward entry).

2. Attempted Burglary Of A Dwelling Under Florida Law Requires Conduct That Presents A Serious Risk Of Physical Injury To Another

Because Florida law requires an overt act directed toward entering the dwelling, the risk of physical injury presented by the crime of attempted burglary of a dwelling in Florida is virtually the same as the risk presented by a completed burglary. As the First Circuit has explained in holding that attempted breaking and entering under Massachusetts law is a violent felony under the "otherwise clause" of the ACCA, a violent encounter "is

just as likely to happen before the defendant succeeds in breaking in as after." *United States* v. *Payne*, 966 F.2d 4, 8 (1st Cir. 1992).[9] And even if the defendant is more apt to feel trapped and "to cause greater alarm to whomever he confronts" when the encounter occurs inside the dwelling, "the fact remains that there is a serious risk of confrontation while a perpetrator is attempting to enter the building" and that confrontation "is sufficiently likely to result in violence" to conclude that attempted burglary (or attempted breaking and entering) falls within the "otherwise" clause of Section 924(e)(2)(B)(ii). *Ibid.* Many other courts of appeals have similarly (and correctly) concluded that attempted burglary is a violent felony under the ACCA because the immediate risk of physical injury that it presents is comparable to that posed by a completed burglary.[10]

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[9] The court in *Payne* construed the Massachusetts statute as requiring conduct beyond "procuring burglary tools and setting out for certain premises" such as "coming on to the premises and being scared off or trying and being unable to break the lock." 966 F.2d at 9.

[10] See *United States* v. *Collins*, 150 F.3d 668, 670-671 (7th Cir.) ("Wisconsin's requirement that a defendant must attempt to enter a building before he can be found guilty of attempted burglary is sufficient to mandate that attempted burglary in Wisconsin constitutes a violent felony [under the "otherwise clause" of the ACCA]."), cert. denied, 525 U.S. 989 (1998); *United States* v. *Bureau*, 52 F.3d 584, 592-593 (6th Cir. 1995) (holding that attempted burglary under Tennessee law, a survey of which revealed that "a defendant convicted of this crime likely entered or nearly entered a building," is a violent felony under the ACCA because "the propensity for a violent confrontation and the serious potential risk of injury inherent in burglary is not diminished where the burglar is not successful in completing the crime"); *United States* v. *Davis*, 16 F.3d 212, 218 (7th Cir.) (observing that "there is little difference between the risk of confrontation in an attempted burglary and that in a completed burglary" where the law requires "dangerous proximity to success") (citation omitted), cert.

The decisions in which various courts of appeals have ruled that attempted burglary is not categorically a violent felony under the ACCA have involved state statutes that the federal court construed to permit conviction based on conduct that falls considerably short of an attempted entry. See *United States* v. *Weekley*, 24 F.3d 1125, 1127 (9th Cir. 1994) ("An attempt conviction would involve risky conduct where the statute requires, or the charging instruments and jury instructions show that the jury had to find, an entry or near-entry into a building. But an attempt conviction based on casing a home or merely possessing burglary tools would not.") (footnotes omitted); *United States* v. *Permenter*, 969 F.2d

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denied, 513 U.S. 945 (1994); *United States* v. *Andrello*, 9 F.3d 247, 249-250 (2d Cir. 1993) (per curiam) ("[S]ince burglary itself is a crime that inherently involves a risk of personal injury, the crime of attempted burglary under New York law, which requires proof of conduct that would present a serious potential risk of attainment, must be considered a crime that 'involves conduct that presents a serious potential risk of physical injury to another.'"), cert. denied, 510 U.S. 1137 (1994); *United States* v. *Thomas*, 2 F.3d 79, 80 (4th Cir. 1993) ("[T]he risk of confrontation, and physical harm, created when someone interrupts an intruder in the process of breaking in is nearly as great as the risk created when the interruption occurs after access is gained."); *United States* v. *O'Brien*, 972 F.2d 47, 52 (3d Cir. 1992) ("[T]he possibility of a violent confrontation with an innocent party is always present when a perpetrator attempts to enter a building illegally, even when the crime is not actually completed."), cert. denied, 510 U.S. 875 (1993); see also *United States* v. *DeMint*, 74 F.3d 876, 877-878 (8th Cir.) (per curiam) (attempted burglary under Florida law is violent felony under the ACCA), cert. denied, 519 U.S. 951 (1996); *United States* v. *Solomon*, 998 F.2d 587, 589-590 (8th Cir.) (same for Minnesota law), cert. denied, 510 U.S. 1026 (1993); *United States* v. *Fish*, 928 F.2d 185, 188 (6th Cir.) (Michigan law), cert. denied, 502 U.S. 834 (1991); *United States* v. *Lane*, 909 F.2d 895, 903 (6th Cir. 1990) (Ohio law), cert. denied, 498 U.S. 1093 (1991).

911, 914 (10th Cir. 1992) (observing that, under Oklahoma law, "a person can be convicted of attempted burglary * * * for conduct that does not involve contact or potential contact with another person"); *United States* v. *Strahl*, 958 F.2d 980, 986 (10th Cir. 1992) (under Utah law, "an attempted burglary conviction may be based upon conduct such as making a duplicate key, 'casing' the targeted building, obtaining floor plans of a structure, or possessing burglary tools"); *United States* v. *Martinez*, 954 F.2d 1050, 1054 & n.3 (5th Cir. 1992) (under Texas law, attempted burglary does not present same risk as completed burglary because "a defendant may be convicted of attempted burglary * * * without being in the vicinity of any building" and "could commit the crime in virtual solitude").

Regardless of whether those cases were correctly decided, but see Part A, *supra; United States* v. *Bureau*, 54 F.3d 584, 592 (6th Cir. 1995) (the decisions holding that attempted burglary is not a violent felony "overlook[] the word 'potential' in the 'otherwise' provision") (quoting *United States* v. *Kaplansky*, 42 F.3d 320, 323 (6th Cir. 1994) (en banc)), the requirement that the defendant commit an overt act directed toward entering the dwelling ensures that the conduct involved in an attempted burglary of dwelling under Florida law categorically will present a "serious potential risk of physical injury to another." Anytime someone who intends to commit a burglary goes so far as to engage in conduct directed towards entering a dwelling, there is a serious risk that a violent encounter will occur. While it is possible that, in cases where the burglary is frustrated by the presence of another, the perpetrator will simply run away, and while it is possible that the burglary may simply fail because the perpetrator is unable to get inside

the dwelling, those possibilities do not negate the existence, *ex ante*, of a serious risk that the perpetrator's conduct in seeking entry to commit a burglary will provoke violence. The prospect of injury in those circumstances is far from remote. See *United States* v. *Mathews*, 453 F.3d 830, 837 (7th Cir. 2006) ("[I]n postulating a hypothetically non-violent scenario, [the defendant] misunderstands the basic inquiry under subsection (e)(2)(B)(ii)'s 'otherwise' clause. By speaking of 'serious *potential risk*,' * * * the statute deals in probabilities of injury, not certainties."); *United States* v. *Thomas*, 361 F.3d 653, 659 (D.C. Cir. 2004) ("A 'risk,' of course, is merely 'the possibility' of loss or injury. * * * And while the addition of the adjective 'serious' would seem to increase the required degree of probability, the interjection of the second adjective, 'potential,' appears to reduce it again.") (quoting *Merriam Webster's Collegiate Dictionary* 912, 1011 (10th ed. 1996)), vacated on other grounds, 543 U.S. 1111 (2005); see also *Kaplansky*, 42 F.3d at 325.

Indeed, the same possibilities of non-violence can easily be hypothesized for completed burglary yet it is expressly covered by the statute. For example, the burglar may (and often goes out of his way to) commit the offense when no one is home.[11] Despite the reality that many burglaries will in fact be committed without any violent confrontation, Congress determined that burglary met the criteria for a violent felony and should be categorized as such. As this Court explained in *Taylor*, when Congress expanded the ACCA in 1986, it chose to

[11] As a practical matter, completed burglaries will often be completed precisely because the dwelling is unoccupied, whereas attempted burglaries will often remain attempts because the presence of another individual frustrated the burglary. See note 5, *supra*.

include as qualifying offenses not only crimes that required the use of force against persons but also crimes against property such as burglary that pose a serious danger to others. See 495 U.S. at 587-589. While Congress left it to the courts to determine what other crimes besides those enumerated similarly present a "serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), the crimes that Congress identified as meeting that standard provide paradigms for purposes of identifying those other offenses. See *Thomas*, 361 F.3d at 659 (reasoning that the enumerated offenses under the career offender enhancement provision of the Sentencing Guidelines (whose language is virtually identical to the ACCA) can properly serve as a benchmark against which the risk presented by another offense may be measured to determine whether it qualifies). And because the crime of attempted burglary of a dwelling under Florida law does not "carr[y] appreciably less risk of injury" (*id.* at 660) than does burglary, it falls within the "otherwise" clause.[12]

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[12] Petitioner suggests that it is anomalous to categorize attempted burglary of a dwelling as a violent felony, because Florida does not categorize it as such. See Pet. Br. 27. But the question here is whether attempted burglary of a dwelling is a violent felony *under federal law*, so the manner in which the crime is categorized by the State is irrelevant. See, *e.g.*, *United States* v. *Walker*, 442 F.3d 787, 788 (2d Cir. 2006) (per curiam) (deeming New York's classification of offense as non-violent felony irrelevant for purposes of determining whether offense is "violent felony" under the ACCA). For the reasons discussed in Part A, *supra*, there is nothing anomalous in concluding that attempted burglary triggers the same sentencing consequence as burglary for *federal* sentence enhancement purposes. Moreover, as petitioner points out (Pet. Br. 16), the maximum sentence in Florida for attempted burglary of a dwelling is five years, and the ACCA requires only that the crime be "punishable by imprisonment for a term

C. The ACCA's Plain Language Does Not Exclude Attempts

Petitioner argues (Pet. Br. 17-20) that, even if attempted burglary of a dwelling "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), it cannot be counted as a violent felony because the plain language of Section 924(e)(2)(B) reflects Congress's intent to exclude attempts from subsection (e)(2)(B)(ii). That claim lacks merit.

1. The Expressio Unius Canon Does Not Apply

Petitioner first invokes the cannon of *expressio unius est exclusio alterius*, contending that the inclusion of the word "attempt" in Subsection (e)(2)(B)(i) but not in Subsection (e)(2)(B)(ii) demonstrates a deliberate choice by Congress to exclude attempt crimes from the "otherwise" clause in subsection (ii). That canon, however, "does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series' justifying the inference that items not mentioned were excluded by deliberate choice." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States* v. *Vonn*, 535 U.S. 55, 65 (2002)); see *Ford* v. *United States*, 273 U.S. 593, 611-612 (1927). Here, had "violent felony" been defined to mean "arson, attempted arson, extortion, attempted extortion, or burglary," there might be a role for the cannon to play in supporting the conclusion that Congress intended to omit attempted burglary. But that is not what the statute provides. Subsection (e)(2)(B)(i) sets out one criterion—crimes that have "as an element

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exceeding one year." 18 U.S.C. 924(e)(2)(B).

the use, attempted use, or threatened use of physical force against" persons—that Congress used to identify violent felonies. Subsection (e)(2)(B)(ii) sets out a second, alternative criterion: crimes involving conduct that presents a serious potential risk of physical injury to another. Subsection (e)(2)(B)(ii) also sets out four examples of crimes or conduct—burglary, arson, extortion, and the use of explosives—that meet that criterion. See *Taylor*, 495 U.S. at 589. Congress's formulation of the second criterion—"involves conduct that presents a serious potential risk of injury"—is an expansive one that indicates that Congress sought to include *any* crime, be it an attempt, conspiracy, or completed offense, that carries the requisite level of risk of injury. See *Davis*, 16 F.3d at 217 (deeming "untenable" the contention that Congress would have expressly referenced attempt crimes in subsection (e)(2)(B)(ii) had it desired to include them "in light of the very existence of the 'otherwise' clause, which Congress plainly included to serve as a catch-all provision").[13]

That expansive language plainly does not imply, much less establish, that Congress sought to exclude crimes on the basis of some criterion (such as their inchoate nature) other than the one identified. See *United States* v. *King*, 325 F.3d 110, 112-114 (2d Cir.) (rejecting similar argument that because the definition of "serious drug offense" does not reference attempts, and the definition of "violent felony" (in Section 924(e)(2)(B)(i)) does, Congress intended to exclude attempted drug of-

[13] Subsection (e)(2)(B)(i), by contrast, does not include a similar catch-all clause. It would be particularly inappropriate to draw an inference from one section expressly including attempt, but not featuring a catch-all clause, that the catch-all clause in the second section excluded attempt.

fenses), cert. denied, 540 U.S. 920 (2003); see also *United States* v. *Winbush*, 407 F.3d 703, 705-708 (4th Cir. 2005) (adopting *King*); cf. *Chevron U.S.A. Inc.*, v. *Echazabal*, 536 U.S. 73, 80 (2002) ("[T]he expansive phrasing of [the provision] points directly away from the sort of exclusive specification [the respondent] claims.").

2. The Ejusdem Generis Canon Does Not Aid Petitioner

Petitioner's invocation of the "maxim of *ejusdem generis*" (Pet. Br. 18-19) to exclude attempts from the "otherwise" clause is equally unavailing. Petitioner contends (Pet. Br. 19) that the "common attribute" of the crimes and conduct that precede the "otherwise" clause in Subsection (e)(2)(B)(ii) is "completion" such that the "otherwise" clause should be read to apply to completed offenses only.[14] But the "otherwise" clause itself identifies the "common attribute" that is relevant to Subsection (e)(2)(B)(ii), namely, whether the prior offense "involves conduct that presents a serious potential risk of injury to another." Cf. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980) (rejecting application of *ejusdem generis* because "we discern no uncertainty in

[14] Apart from the problems discussed in the text, the premise of petitioner's argument—that the crimes listed share the attribute of completion—is incorrect. An attempt could undoubtedly "involve[] use of explosives." See, *e.g.*, 18 U.S.C. 844(i) (making it a crime to "maliciously damage[ ] or destroy[], or attempt[] to damage or destroy, by means of fire or an explosive, any building, vehicle, [etc.]"). Another problem with petitioner's reading of the statute is that it would exclude numerous attempt crimes, such as those set out in Section 844(i), that undoubtedly present a "serious potential risk of physical injury to another." This Court will not interpret a statute to produce an absurd result, especially where the plain language, structure, purpose, and history of the provision do not support that interpretation. See *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

the meaning of the phrase, 'any other final action,'" and because "[t]his expansive language offers no indication whatever that Congress intended the limiting construction * * * that the respondents now urge"); *Gooch* v. *United States*, 297 U.S. 124, 128 (1936) (rejecting *ejusdem generis* where its application would "require rejection of that sense of the words which best harmonizes with the context and the end in view"). The crimes and conduct expressly enumerated are examples of offenses that meet that criterion and were listed out of an abundance of caution to make clear that those examples met the standard. See *Taylor*, 495 U.S. at 589. If anything, the canon of *ejusdem generis* supports the government's position, because attempted burglary is very similar to burglary in the most relevant respect, the risk of injury to innocent persons that it presents. See *Thomas*, 361 F.3d at 659-660 (invoking *ejusdem generis* canon in concluding that the crime of escape is a crime of violence because it does not "carr[y] appreciably less risk of injury to another than do the listed crimes").

3. The Legislative History Does Not Support Petitioner's Reading Of The Text To Exclude Attempts

Petitioner contends (Pet. Br. 19-20) that Congress's failure in 1984 to enact a Senate bill that would have included attempted burglaries and conspiracies supports reading the current version of the ACCA to exclude attempts. That claim too lacks merit. If the ACCA had not been amended in 1986 and still defined "violent felony" to mean only "robbery or burglary" petitioner would have a point. But the law was amended in 1986 to "'expand[]' the range of predicate offenses." *Taylor*, 495 U.S. at 584 (citing *Armed Career Criminal Legislation:*

Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (1986)).

The bills seeking to amend the ACCA replaced the 1984 law's reference to "robbery or burglary, or both" with two broad classes of predicate offenses, "serious drug offenses" and "violent felonies" or "crimes of violence." One bill, H.R. 4768, § 2(b), 99th Cong., 2d Sess. (1986), defined "violent felony" to mean only "any State or Federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another." Another bill, H.R. 4885, § 2(b), 99th Cong., 2d Sess. (1986), included that same definition of violent felony but defined "violent felony" also to include offenses that "involve[] conduct that presents a serious potential risk of physical injury to another." The Report accompanying H.R. 4885 explained that the purpose of the latter definition was to "add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person." *Taylor*, 495 U.S. at 587 (quoting H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986)). As the Court explained in *Taylor*, the bill that ultimately became law, H.R. 5484, amended H.R. 4885 by adding the phrase "*is burglary, arson, or extortion, involves use of explosives, or otherwise* involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 587 (quoting 18 U.S.C. 924(e)(2)(B)(ii)).

What the legislative history demonstrates is that Congress sought broadly to expand the category of violent felonies by including crimes targeting persons for physical harm and by including crimes that do not spe-

cifically target persons for physical harm but nevertheless by their nature present a serious potential risk that a person will be injured. There is no indication in the legislative history that Congress chose a *broad* formulation for injury-risking offenses in order to achieve the counterintuitive purpose of *excluding* attempt crimes. Instead, Congress chose "uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law." *Taylor*, 495 U.S. at 590.

D. Florida's Treatment Of Curtilage Does Not Take Attempted Burglary Of A Dwelling Outside The Otherwise Clause

Petitioner contends (Pet. Br. 23) that attempted burglary under Florida law does not categorically present "a serious potential risk of physical injury to another" on the ground that Florida's burglary statute is "non-generic." He points out that the statute "criminalizes the entry of 'conveyance[s]'" and "expands the definition of burglary to include not only buildings, but also the grounds around the buildings." *Id.* at 21 (quoting *State* v. *Hamilton*, 660 So. 2d 1038, 1041 (Fla. 1995)).[15] Petitioner's claim lacks merit.

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[15] In evaluating whether petitioner's prior attempted burglary conviction presented a serious potential risk of injury to another, this Court may take as a given that his conviction was for attempted burglary of a dwelling, because petitioner admitted that fact at his change of plea hearing. See 1/13/04 Tr. 12-16; Pet. Br. 38 (conceding that "[p]etitioner did not contest the fact of his prior attempted burglary of a dwelling conviction"); *United* States v. *Wade*, 453 F.3d 1273, 1278 n.1 (11th Cir. 2006) (observing that the *James* decision "covers convictions for attempted burglary of a dwelling, not any other

1. To begin with, the court of appeals did not rest its conclusion that petitioner's attempted burglary conviction is a "violent felony" on the ground that Florida's burglary statute satisfies *Taylor*'s definition of generic burglary. To the contrary, the court of appeals held that attempted burglary is a violent felony because it "otherwise involves conduct that presents a serious potential risk of physical injury to another." See J.A. 54 ("[A]n attempt to commit burglary * * * presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of 'violent felony.'").[16] The prem-

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crime"). Furthermore, petitioner did not object to the PSR's factual account of the offense, which identified the targeted property as an occupied residence. See 5/10/04 Tr. 3; *United States* v. *Harris*, 447 F.3d 1300, 1306 (10th Cir. 2006) ("[The defendant's] failure to object to the PSR created a factual basis for the court to enhance his sentence under the ACCA."); *United States* v. *Shelton*, 400 F.3d 1325, 1330 (11th Cir. 2005) (holding that a defendant "admit[s] the facts in the PS[R]" when he does not dispute them); but see *United States* v. *McCall*, 439 F.3d 967, 974 (8th Cir. 2006) (en banc) (remanding case for further proceedings where PSR indicated that it was relying on sources not approved by *Taylor* or *Shepard*, even though the defendant did not object to the "PSR recitals"); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc) (sentencing court may not rely upon a PSR's recitation of the underlying facts of the crime resulting in the prior conviction, even if uncontested, at least where the "information contained in [the] presentence report [does not itself come] from an identified, acceptable source [that] can constitute evidence under *Taylor*'s modified categorical approach"). Petitioner's attempt to inject Florida's treatment of curtilage into this case after the decision was rendered below could similarly be rejected on the ground that he affirmed that he was not objecting to any facts in the PSR, including the fact that his attempted burglary involved an attempted entry into the residence itself. See PSR para. 29.

[16] Petitioner contends (Pet. Br. 14 n.6) that the basis for the court of appeals' decision is unclear and that its more recent decision in *Wade*, *surpa*, appears to have held that attempted burglary of a dwelling is

ise of petitioner's argument—that non-generic burglary does not "present a serious potential risk of physical injury"—finds no support in *Taylor*. The *Taylor* Court nowhere suggested, much less held, that a non-generic burglary offense could not satisfy the "otherwise" clause. To the contrary, the Court stated that "[t]he Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another' under § 924(e)(2)(B)(ii)." 495 U.S. at 600 n.9.

2. Florida's treatment of curtilage does not undercut the court of appeals' conclusion that attempted burglary of a dwelling under Florida law categorically presents a serious potential risk of injury to another. "The cur-

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encompassed within the reference to generic "burglary" in Section 924(e)(2)(B)(ii) such that it is unnecessary to determine whether attempted burglary satisfies the ACCA's "otherwise" clause. The rationale for the Eleventh Circuit's decisions is clear, however. Both the decision below and *Wade* relied on *United States* v. *Rainey*, 362 F.3d 733, 736 (11th Cir.) (per curiam), cert. denied, 541 U.S. 1081 (2004) which held that attempted arson is a "violent felony" under the ACCA. The court there expressly held that "[b]ecause attempted arson presents a serious potential risk of injury to another person, * * * the district court correctly concluded that it is a violent felony under § 924(e)." *Ibid.* The decision below also relied on *Wilkerson*, 286 F.3d at 1325, which held that conspiracy to commit robbery presents a serious potential risk of physical injury because the object of the conspiracy itself "presents such a risk." The Eleventh Circuit's holdings that an attempt to commit an enumerated offense such as burglary or arson is a violent felony thus do not rest on the notion that the enumeration of the generic offense includes the attempt offense, but rather on the notion that the risks inherent in the completed offense inhere in the attempt to a sufficient degree to justify treating the attempt to commit the violent felony as a violent felony itself under the "otherwise" clause.

tilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *United States* v. *Dunn*, 480 U.S. 294, 300 (1987). Under Florida law, a dwelling, the burglary of which is a second degree felony, see note 7, *supra*, is defined to include its curtilage. See Fla. Stat. § 810.011(2) (1993). As the Florida Supreme Court has explained, "in England a person's house with its cluster of outbuildings was usually enclosed by a wall or fence, and this enclosed area was referred to as the curtilage." *Hamilton*, 660 So. 2d at 1042. At common law, "[b]uildings not used for habitation (such as barns, stables, and other outhouses) might still be the subject of burglary if they were part of the * * * curtilage of the mansion house." LaFave § 8.13(c), at 796 (citing 4 William Blackstone, *Commentaries* * 225). Florida's modern burglary statute departed from the common law by making a breach of the curtilage itself (as opposed to the structures located within it) a violation of the burglary statutes. See *id.* at 796-797 ("The curtilage originally signified a fenced-in area, * * * but the breaking of the curtilage itself was not an offense."); *Hamilton*, 660 So. 2d at 1041 ("Florida's present burglary statute expands the definition of burglary to include not only buildings, but also the grounds around the buildings.").

In *Hamilton*, the Florida Supreme Court held that, for purposes of Florida's burglary statute, "some form of an enclosure [is required] in order for the area surrounding a residence to be considered part of the 'curtilage' as referred to in the burglary statute." 660 So. 2d at 1044; *id.* at 1043 (citing with approval jury instruction that defines curtilage to mean "the enclosed grounds immediately surrounding the building"). The

court proceeded to invalidate a burglary conviction that was predicated on the defendant's entry into the backyard of a home that "was not enclosed in any manner other than 'several unevenly spaced trees.'" *Id.* at 1046.

Even assuming *arguendo* that Florida's treatment of curtilage would take its burglary statute outside *Taylor*'s definition of generic burglary,[17] it is clear that burglary of a dwelling under Florida law categorically "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). The *Hamilton* case limited the scope of curtilage to an enclosed space surrounding the dwelling. See *Baker* v. *State*, 636 So. 2d 1342, 1344 (Fla. 1994) (stating that the curtilage "is an integral part of the structure or dwelling that it surrounds"); *Martinez* v. *State*, 700 So. 2d 142, 143-144 (Fla. Dist. Ct. App. 1997) (holding that an unattached garage is not part of the dwelling's curtilage because property was not enclosed). A resident is apt to protect that enclosed space proximate to the dwelling in the same manner that he would protect the dwelling itself or another structure located within the enclosed space. That is presumably why it is enclosed. A resident who goes to the trouble of enclosing his property has manifested an expectation that the area enclosed will be private, and the resident will defend that expectation accordingly.

The protection that the Fourth Amendment accords the curtilage reflects that understanding. As this Court has observed, "[t]he [Fourth Amendment] protection afforded the curtilage is essentially a protection of fami-

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[17] *Taylor* did not address the concept of curtilage. But see *United States* v. *Pluta*, 144 F.3d 968, 975-976 (6th Cir.) (Florida's burglary statute is non-generic because it includes burglaries of conveyances and the curtilage), cert. denied, 525 U.S. 916 (1998).

lies and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California* v. *Ciraolo*, 476 U.S. 207, 212-213 (1986).[18] Given the "heightened" expectation of privacy that a resident of a dwelling would possess with respect to his curtilage, and because the curtilage under Florida law must be proximate to the dwelling and enclosed, the Court's observations in *Taylor* and *Leocal* about the likelihood of a confrontation between the burglar and a resident and the concomitant threat of physical injury that burglary poses are no less applicable to the dwelling's curtilage than to the dwelling itself.[19]

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[18] This Court applies a four-factor test in determining whether a given area is properly characterized as curtilage for Fourth Amendment purposes. See *Dunn*, 480 U.S. at 301 ("[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."). Thus, Florida's definition of curtilage for purposes of its burglary statute is narrower than this Court's Fourth Amendment conception of curtilage to the extent that the *Dunn* test would permit a finding that a non-enclosed area is curtilage subject to Fourth Amendment protection. See, *e.g.*, *Widgren* v. *Maple Grove Township*, 429 F.3d 575, 582 (6th Cir. 2005) (finding yard to be curtilage because, among other reasons, "although the area was not within an enclosure, a clear line marked the mowed portion from the surrounding area that had not been cleared").

[19] For all of his emphasis on curtilage, petitioner cites no cases in which the Florida courts have upheld an attempted burglary conviction based on an attempted entry into the land surrounding a dwelling as opposed to the dwelling itself.

E. Neither The Doctrine Of Constitutional Avoidance Nor The Rule Of Lenity Applies

Petitioner's resort to the doctrine of constitutional avoidance (Pet. Br. 33-39) is unfounded. Petitioner suggests that covering attempted burglaries implicates the concerns about judicial fact-finding voiced in *Jones* v. *United States*, 526 U.S. 227 (1999), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). But those cases concern fact-finding about the defendant's conduct on matters particular to his case. The court of appeals did not engage in any such fact-finding in this case, much less fact-finding that would raise constitutional concerns. To the contrary, the court made the quintessential legal determination that attempted burglary of a dwelling under Florida law "involves conduct that presents a serious potential risk of injury to another." 18 U.S.C. 924(e)(2)(B)(ii). That determination involves the application of the language of Section 924(e)(2)(B)(ii) to the elements of attempted burglary and the concomitant judgment that the risk of harm presented by the conduct required to establish those elements meets the ACCA's threshold "level of seriousness" (*Taylor*, 495 U.S. at 590). That legal exercise is the province of the court, not the jury. Indeed, that determination does not require *any* assessment of the facts specific to petitioner's prior conviction. In fact, petitioner's argument ultimately reflects nothing more than a disagreement with the court of appeals' conclusion about the threat attempted burglary of a dwelling presents. But Congress by enacting the "otherwise" clause expressly left it to the courts to make precisely that determination.

Nor does the rule of lenity (Pet. Br. 39-40) assist petitioner. That rule requires a "grievous ambiguity" in

statutory text such that, "after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted and punctuation altered). Petitioner, however, does not identify any particular language in the statute that he claims is ambiguous. Instead, his argument here (Pet. Br. 40) again appears simply to reflect a disagreement with the court of appeals' conclusion that attempted burglary of a dwelling presents a "serious potential risk" of injury. Congress chose a formulation, "serious potential risk of physical injury," 18 U.S.C. 924(e)(2)(B)(ii), that requires courts to make commonsense judgments based on everyday experience and cases that come before them, and provided four examples of crimes or conduct that satisfy the standard it established. Courts are fully capable of deciding whether a given crime presents a risk of harm that is closely related or comparable to that presented by the enumerated offenses. For the reasons discussed in Parts A & B, there is no doubt that petitioner's prior offense is a "violent felony" under the ACCA.

F. Petitioner's Conviction Satisfies The ACCA Under A Modified Categorical Approach

Even if this Court were to conclude that attempted burglary of a dwelling under Florida law does not categorically present a "serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), on the theory that the crime encompasses some conduct that does not present that risk, it should permit courts to apply the *Taylor* methodology to determine whether the attempted burglary at issue satisfies the statutory criterion. In *Taylor*, this Court held that it was permissible

for sentencing courts to go beyond the mere fact of conviction in burglary cases where a statute swept more broadly than the generic definition of burglary. 495 U.S. at 599-602. In particular, the Court ruled that a sentencing court could consult the "charging paper and jury instructions" to determine whether the defendant was in fact convicted of generic burglary. *Id*. at 602. In *Shepard*, this Court ruled that a similar inquiry could be conducted for guilty-plea based convictions, permitting a court to review "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record" in deciding whether a defendant who was convicted under an overly broad statute "necessarily admitted elements of the generic offense." 544 U.S. at 26.

A parallel inquiry could be undertaken in this context to determine whether a conviction under an attempted burglary statute that does not categorically satisfy the "otherwise" clause nevertheless qualifies because the defendant "necessarily admitted elements" of an attempted burglary offense that does satisfy the "otherwise" clause.[20] Whatever standard for attempted bur-

[20] Although this Court has recognized that the modified categorical approach adopted in *Taylor* "covered other predicate ACCA offenses," *Shepard*, 544 U.S. at 17 n.2, the federal courts of appeals are divided on whether a modified categorical approach may be undertaken with respect to the "otherwise" clause. Compare, *e.g.*, *McCall*, 439 F.3d at 973 (permitting resort to sources approved in *Taylor* and *Shepard* to determine whether the defendant's prior drunk driving conviction fell under the "otherwise" clause where the statute under which he was convicted was "overinclusive * * * because it criminalizes non-driving conduct that does not necessarily present a serious risk of physical injury to others"), with *Permenter*, 969 F.2d at 914 (rejecting applica-

glary of a dwelling this Court might adopt, petitioner's attempted burglary offense, which involved his throwing a hammer through the window of the dwelling he attempted to burglarize, surely would meet it. Petitioner's attempted physical entry into the dwelling unquestionably presented a "serious potential risk of physical injury to another."

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tion of modified categorical approach to the "otherwise" clause). See also *United States* v. *Piccolo*, 441 F.3d 1084, 1088 n.7 (9th Cir. 2006) ("Although we have previously left open the question whether the modified categorical approach applies to cases arising under the 'catchall' provision, we see no reason why it would not apply to that provision.") (citations omitted); *Weekley*, 24 F.3d at 1127 & n.3 (concluding that attempted burglary under Washington law does not categorically satisfy the "otherwise" clause and further observing that while an attempt conviction would satisfy the "otherwise" clause if the "statute requires, or the charging instruments and jury instructions show that the jury had to find, an entry or near-entry into a building" "there is nothing in the charging instruments or plea agreement indicating that [defendant's] conduct entailed entry or near-entry").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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