No. 05-9264

IN THE

Supreme Court of the United States

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF PETITIONER

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August 17, 2006

QUESTION PRESENTED

Whether the Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e).

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The opinion of the Court of Appeals for the Eleventh Circuit is reported at 430 F.3d 1150 (11th Cir. 2005) (JA 44-54).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was issued on November 17, 2005. Petitioner timely filed a Petition for Writ of Certiorari on February 14, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

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

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

> confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 922(g) of Title 18 to the United States Code provides in relevant part that:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 924(e) of Title 18 to the United States Code provides in relevant part that:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection— . . .
>
> (B) the term "violent felony" . . . means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

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

Florida Statute § 777.04(1) (1994) provided in relevant part that:

> 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 . . . .

Florida Statute § 810.02(1) (1994) provided that:

> "Burglary" means entering or remaining in a structure or a 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.

Florida Statute § 810.02(3) (1994) provided that:

> If the offender does not make an assault or battery or is not armed, or does not arm himself, with a dangerous weapon or explosive as aforesaid during the course of committing the offense and the structure or conveyance entered is a dwelling or there is a human being in the structure or conveyance at the time the offender entered or remained in the structure or conveyance, the burglary is a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084. Otherwise, burglary is a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Florida Statute § 810.011(2) (1994) provided in relevant part that:

> "Dwelling" means a building or conveyance of any 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.

STATEMENT OF THE CASE

The Armed Career Criminal Act ("ACCA") is the product of Congress's determination to severely punish the possession of firearms by individuals convicted of three or more "violent felon[ies]" or "serious drug offense[s]." 18 U.S.C. § 924(e)(1). Such individuals face a fifteen-year mandatory minimum sentence for merely "possess[ing] . . . any firearm or ammunition." *Id.* § 922(g). But Congress carefully limited the ACCA's severe penalties by enumerating the precise types of crimes that would constitute predicate acts for these harsh penalties. In particular, a "violent felony" is restricted to a crime punishable by imprisonment of more than one year that either (1) "has as an element the use, *attempted* use, or threatened use of physical force against the person of another" or (2) "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.* § 924(e)(2)(B)(i)-(ii) (emphasis added).

The Eleventh Circuit's decision in this case offends these careful limitations by holding that any attempt to commit a crime enumerated in § 924(e)(2)(B)(ii) will itself automatically constitute a violent felony. This approach is inconsistent with the statute and with this Court's decisions in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), both of which prohibit factual inquiries beyond those facts necessarily found by the jury or in the defendant's statements to the court.

Accordingly, this Court should reverse the Eleventh Circuit and remand to the District Court for resentencing.

On January 31, 2003, Petitioner Alphonso James, Jr. was stopped for driving an automobile with a defective taillight and a loudly playing stereo. During the stop, the officer detected an odor of marijuana and searched Petitioner's vehicle. The officer found a handgun and ammunition in the vehicle, and Petitioner was arrested. A subsequent indictment in the United States District Court for the Middle District of Florida charged Petitioner with one count of Possession of a Firearm and Ammunition by a Convicted Felon as an Armed Career Criminal, under 18 U.S.C. §§ 922(g)(1) and 924(e). JA 14-15. Petitioner pled guilty. JA 5. At sentencing, the prosecution argued that his jail term should be enhanced from the Guideline range of 51 to 71 months to the ACCA mandatory minimum of fifteen years. The prosecution claimed that Petitioner had been convicted of three prior felonies that qualified as either "violent felonies" or "serious drug offenses" under § 924(e): (1) a June 3, 1997 conviction under Florida Statutes §§ 777.04 and 810.02 for the attempted burglary of a dwelling, in the Circuit Court of the 20th Judicial Circuit in and for Lee County, Florida; (2) a January 28, 1998 conviction under Florida Statute § 893.135 for trafficking in illegal drugs, also in the Circuit Court of the 20th Judicial Circuit in and for Lee County, Florida; and (3) a June 29, 1998 conviction under Florida Statute § 893.135 for trafficking in cocaine, in the Circuit Court of the 17th Judicial Circuit in and for Brevard County, Florida. JA 14-15. Petitioner conceded that the January 1998 conviction for trafficking in illegal drugs satisfied the ACCA's standards for a sentence enhancement, but contested the designation of his conviction for attempted burglary as a "violent felony" and his conviction for trafficking in cocaine as a "serious drug offense." JA 21.

In determining whether Petitioner's conviction for attempted burglary of a dwelling was an ACCA predicate, the

District Court adhered to this Court's directive in *Taylor* and did not examine the specific facts of Petitioner's conviction. Instead, the District Court focused solely on the definition of attempted burglary under Florida law. The discussion at sentencing therefore centered on the findings required under Florida law for an attempted burglary conviction.

Both at the time of Petitioner's 1997 conviction and at present, Florida law required proof of two elements for criminal attempt: "a specific intent to commit a particular crime, and an overt act toward its commission." *Thomas* v. *State*, 531 So. 2d 708, 710 (Fla. 1988) (footnote omitted); see Fla. Stat. § 777.04(1) (1994).[1] Relying on precedent from the Florida Supreme Court that broadly defined the scope of acts sufficient for a conviction for attempted burglary, Petitioner argued that under Florida law, a conviction for attempted burglary could be based upon conduct that did not "present[] a serious potential risk of physical injury to another," and therefore that such a conviction was not a violent felony under the ACCA. JA 23-24.

The prosecution argued that convictions for attempted burglary in Florida are limited to instances where a person enters or attempts to enter a structure with the intent of committing an offense therein. JA 27 ("You've got to attempt to go into the structure"). Ignoring the statutory language in Florida that allows "any act" to constitute a basis for a criminal attempt conviction and without citing to Florida law, the prosecution asserted that attempted burglary in

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[1] Because Petitioner's 1997 conviction was based on conduct that occurred in 1994, the elements of his 1997 conviction are controlled by Florida law in 1994. *See* JA 14 (docket number for 1997 conviction is "94-2197CF"); *State* v. *Smith*, 547 So. 2d 613, 616 (Fla. 1989) (per curiam) ("[T]he statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed."). While the differences between the 1994 Florida law of attempted burglary and current Florida law are not material to this case, Petitioner will rely on the 1994 statutes.

Florida constituted a violent offense because "not only do you commit an act towards the commission of the offense, you have to actually attempt to commit the offense." JA 27. Recognizing that Florida law does not make such a distinction and defines an attempt based on the presence of an overt act, the District Court expressed strong doubt "that the Florida attempt statute punishes only conduct with a severe potential risk of physical injury to another."[2] JA 33.

The District Court, however, considered itself bound by the Eleventh Circuit's ruling in *United States* v. *Rainey*, 362 F.3d 733 (11th Cir.) (per curiam), *cert. denied*, 541 U.S. 1081 (2004). In *Rainey*, the Eleventh Circuit found that an attempt to commit arson constituted a violent felony under Florida law. See *id.* at 735-36. Despite the District Court's misgivings regarding the statutory elements of attempted burglary, it held that *Rainey* established a *per se* rule that an attempt to commit any enumerated felony under the ACCA constituted a "violent felony" for purposes of a sentence enhancement. JA 34. Based upon this reading of binding Eleventh Circuit precedent, the District Court found that attempted burglary was a violent felony despite its recognition that under Florida law attempted burglary does not just punish conduct with a "serious potential risk of physical injury to another."

The District Court ultimately concluded, however, that Petitioner's prior convictions were insufficient to warrant an ACCA enhancement because his June 1998 conviction for trafficking in cocaine did not constitute a "'serious drug offense.'" JA 45-46. The District Court held that under Florida law, a conviction for trafficking does not involve any intent to distribute. JA 46. Therefore the District Court found that Petitioner had only two predicate offenses that

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[2] The District Court further noted that "[y]ou just read the attempt statute in Florida law and it talks about any act. It doesn't say any act that has a severe potential for physical risk of injury to another." JA 26.

counted toward the ACCA enhancement rather than the required three, and it sentenced him consistent with the federal sentencing guidelines to a 71-month prison term. JA 37.

The prosecution appealed the District Court's refusal to find that his June 1998 conviction qualified as a predicate crime for ACCA purposes, and Petitioner cross-appealed regarding the District Court's holding as to the June 1997 conviction for attempted burglary. The Eleventh Circuit reversed with respect to the ruling on the cocaine trafficking conviction, holding that Florida necessarily infers an intent to distribute when the quantity of drugs reaches a certain level. JA 47-52. The Court of Appeals then affirmed the District Court's ruling that attempted burglary constitutes a "violent felony" under the ACCA. Relying—like the District Court—on its opinion in *Rainey*, the Eleventh Circuit held that any attempt to commit an enumerated felony under § 924(e)(2(B)(ii) is as much a violent felony under the ACCA as the enumerated offenses themselves. See JA 54. The Court of Appeals concluded that any attempt to commit an enumerated felony presents sufficient potential risk of physical injury to be deemed a violent felony. JA 54. While the Eleventh Circuit's reasoning was not entirely clear, its holding appeared to be based on a conclusion that attempted burglary is a crime that "involves conduct that presents a serious potential risk of physical injury to another" and therefore falls within § 924(e)(2(B)(ii)'s residual clause. See JA 54 ("'An uncompleted burglary does not diminish the potential risk of physical injury'").[3] The Eleventh Circuit

[3] In a recent decision, the Eleventh Circuit suggested that its *per se* rule might be based on the assumption that the enumeration of felonies in § 924(e)(2)(b)(ii) necessarily includes attempts to commit those felonies, rather than on the conclusion that attempts fall within the residual clause. *See United States* v. *Wade*¸ __ F.3d ___, 2006 WL 2195284, at *4 (11th Cir. Aug. 4, 2006) ("Our *James* and *Rainey* decisions establish that if an

remanded the case to the District Court for resentencing in accordance with the ACCA mandatory minimum of fifteen years of imprisonment. The District Court imposed that fifteen-year sentence on March 28, 2006.[4] JA 55-57.

SUMMARY OF ARGUMENT

The Eleventh Circuit in this case conducted judicial fact finding to enhance Petitioner's sentence, and in the process established a *per se* rule that all Florida attempted burglary of dwelling convictions qualify as violent felonies under the ACCA. This *per se* rule is irreconcilable with the plain language of the statute and flouts the Court's decisions in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005).

The ACCA defines a violent felony as a crime 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). According to the Eleventh Circuit, any attempt to commit one of the offenses enumerated in § 924(e)(2)(B)(ii) is automatically a violent felony. This *per se* rule is a gross misreading of the statute, because "burglary" in § 924(e)(2)(B)(ii) does not encompass attempted burglary. Attempted burglary in Florida simply does not require proof of the elements required to prove generic burglary: namely, "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 598. By definition, a defendant may only be convicted of attempted burglary of a dwelling in Florida if

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offense is an enumerated violent felony under § 924(e)(2)(B)(ii), then the crime of attempting to commit that offense is also a violent felony").

[4] The District Court entered the new sentence while Petitioner's petition for a writ of certiorari was pending before this Court.

he fails to complete the offense of entering or remaining in the dwelling. As a result, a conviction for attempted burglary of a dwelling necessarily precludes a finding that the defendant actually succeeded in unlawfully entering the dwelling. Thus, under Florida law and the ACCA, burglary and attempted burglary are mutually exclusive.

Attempted burglary of a dwelling also does not categorically "involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). The structure of § 924(e)(2)(B) demonstrates conclusively that Congress did not intend to include attempted burglary as a predicate offense. The juxtaposition of § 924(e)(2)(B)(i), which includes attempts, and § 924(e)(2)(B)(ii), which does not, shows that Congress made a deliberate choice not to include attempted burglary. *Ejusdem generis* principles also support this conclusion, because the residual clause of § 924(e)(2)(B)(ii) follows a list of completed offenses. It too should be read to apply only to completed offenses.

Even assuming Congress intended to include inchoate offenses under the catchall or residual provision, attempted burglary of a dwelling under Florida law is not such an offense. In keeping with *Taylor*'s categorical approach, attempted burglary could only constitute the required risk under § 924(e)(2)(B)(ii) if a conviction for attempted burglary necessarily involves conduct "present[ing] a serious potential risk of physical injury to another." *Id.* An offense for attempted burglary in Florida does not involve such conduct for several reasons. First, Florida's attempt statute requires only minimal action on the part of the defendant. Merely being present in the vicinity, coupled with the intent to commit the crime, is a sufficient act to constitute an attempt. In the same vein, Florida has found attempts where several steps remained before the defendant could complete the crime. Second, burglary is a property crime, not a crime against the person. Although Congress included burglary as

an enumerated offense, one of the primary reasons it did so was its belief that a burglar's entry into a building could create a risk to others. In Florida, however, a person can be found guilty of burglary of a dwelling even if he did not enter the dwelling, as Florida defines burglary of a dwelling to include the curtilage of the dwelling. "[S]tealing apples from a neighbor's backyard would be counted as a burglary under Florida's statute." *United States* v. *Pluta*, 144 F.3d 968, 975-76 (6th Cir. 1998). Combining Florida's expansive definition of burglary and its low threshold for establishing an attempt precludes any finding that an attempted burglary of a dwelling conviction in Florida "involves conduct that presents a serious potential risk of physical injury to another."

In addition to its erroneous interpretation of the plain language of the statute and this Court's decision in *Taylor*, the approach adopted by the Eleventh Circuit raises grave constitutional questions under the Fifth and Sixth Amendments. These amendments guarantee that a criminal conviction must "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995). Additionally, the Court has held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). In this case, no jury has ever found that Petitioner's attempted burglary of a dwelling conviction involved conduct presenting any risk of physical injury to another, let alone a substantial risk. Thus, the doctrine of constitutional avoidance dictates that § 924(e)(B)(2) be interpreted to prohibit judicial fact finding, and in particular the type of fact finding the Eleventh Circuit employed by creating a *per se* rule.

In this case, the Eleventh Circuit has ignored the Court's straightforward holding in *Taylor* and has instead employed

an impermissible factual inquiry approach into the conduct underlying Petitioner's prior conviction for attempted burglary of a dwelling. For this reason the Eleventh Circuit's *per se* rule cannot stand. Finally, if there were any doubt about whether attempted burglary convictions were encompassed by § 924(e), the rule of lenity requires that it be resolved in favor of Petitioner.

ARGUMENT

ATTEMPTED BURGLARY IS NOT A VIOLENT FELONY UNDER 18 U.S.C. § 924(E)(2)(B).

The Eleventh Circuit's decision in this case establishes a *per se* rule: *any* attempt to commit a crime enumerated in 18 U.S.C. § 924(e)(2)(B)(ii) will be treated as a predicate felony for ACCA enhancement purposes. This *per se* rule is wholly inconsistent with the language of the statute and with the approach this Court outlined in *Taylor* and *Shepard*.

In *Taylor*, this Court recognized that sentencing courts must use "a formal categorical approach" to determine whether a prior offense is an ACCA predicate, "looking only to the statutory definitions of the prior offenses, and not the particular facts underlying those convictions." *Taylor*, 495 U.S. at 600. The prior conviction at issue in *Taylor* was a Missouri conviction for burglary. This Court confronted the question of whether this state conviction qualified as a "burglary" under § 924(e)(2)(B)(ii). The term "burglary" is not defined in the ACCA, but this Court held that Congress intended it to reflect a "generic, contemporary meaning of burglary," which this Court defined as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598.

This Court recognized that many states have statutes that define burglary more broadly than this generic definition, such as by "eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and

vending machines, other than buildings." *Id.* at 599. Burglary convictions under these statutes are therefore not categorically "burglary" for ACCA purposes. For states with such statutes, however, a conviction can still qualify as a § 924(e)(2)(B)(ii) predicate if the "jury was actually required to find all the elements of generic burglary." *Id.* at 602. To make this determination, the sentencing court is permitted to examine the charging document and jury instructions to determine whether a prior conviction was for generic burglary. If the jury was actually required to find all of the elements of generic burglary in order to convict—for example, if the jury was required to find an unlawful entry into a building with intent to commit a crime—the conviction can be used for enhancement. *Id.*

In *Shepard*, this Court reaffirmed *Taylor*'s holding that sentencing courts may not engage in fact finding to determine whether a prior conviction qualifies as an ACCA predicate. In *Shepard*, the defendant had been convicted of several breaking and entering offenses in Massachusetts, which defines breaking and entering more broadly than generic burglary. See *Shepard*, 544 U.S. at 17. The First Circuit held that a sentencing court may examine police reports to determine whether Shepard's prior convictions were actually for generic burglary. See *id.* at 18. This Court rejected that approach, holding that courts determining whether an offense qualified under § 924(e) could rely only upon "conclusive records made or used in adjudicating guilt," such as charging documents, jury instructions, or plea colloquies. *Id.* at 20-21. Under the categorical approach of *Taylor* and *Shepard*, therefore, the critical question is whether the "statutory definition of the prior offense" falls within the ACCA definition.

The Eleventh Circuit's *per se* rule that all attempts to commit offenses listed in § 924(e)(2)(B)(ii) are necessarily violent felonies is irreconcilable with *Taylor*, *Shepard*, and with the plain language of the ACCA. Congress has stated

unambiguously which attempted crimes can be treated as ACCA predicate felonies, and attempted burglary is not one of them. The Eleventh Circuit's decision to graft attempts into Congress's carefully crafted definition is a gross misinterpretation of the statute. Even if attempts could be ACCA predicates under § 924(e)(2)(B)(ii), attempted burglary under Florida law is simply not the sort of crime that "involves conduct that presents a serious potential risk of physical injury to another." Florida law embodies both a uniquely broad definition of burglary and a remarkably low threshold to prove attempted burglary. As a result, the requisite conduct for a Florida conviction for attempted burglary does not come close to "conduct that presents a serious potential risk of physical injury to another." Moreover, interpreting § 924(e)(2)(B)(ii)'s residual clause to permit courts to inquire into whether the typical conduct by which attempted burglary is committed creates a serious potential risk to others raises serious constitutional concerns, and the statute should be read so as to avoid those concerns.

A. Attempted Burglary is Not "Burglary."

To constitute a violent felony for ACCA enhancement purposes, Petitioner's 1997 conviction for attempted burglary must be "burglary, arson, or extortion, involve[] use of explosives, or otherwise involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).[5] Before the Eleventh Circuit, the United States maintained that Petitioner's attempted burglary conviction was an enumerated "burglary" under § 924(e)(2)(B)(ii).[6] This contention can be rejected out of

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[5] The attempted burglary conviction unquestionably does not satisfy § 924(e)(2)(B)(i), which only applies to offenses that "ha[ve] as an element the use, attempted use, or the threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

[6] It is not clear whether the decision in the instant case accepted this contention or instead held that attempts are encompassed within

hand. "Burglary" in § 924(e)(2) means "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 598. A Florida conviction for attempted burglary plainly would not require these elements. The conduct Florida requires for attempted burglary can stop well short of "entry" into a building or structure. *See infra* pp. 20-28.

Indeed, in Florida a defendant may only be convicted of attempting an offense if he *failed* to complete the offense. Florida Statute § 777.04 only applies when a defendant "fails in the perpetration or is intercepted or prevented in the execution" of the attempted offense. As a result, a conviction for attempted burglary necessarily precludes a finding that the defendant actually succeeded in unlawfully entering a building. Cf. *State* v. *Ortiz*, 766 So. 2d 1137, 1143 (Fla. 3d Dist. Ct. App. 2000) ("By its nature, attempt occupies the conceptual area between the non-commission of the greater offense and the completion of the greater offense itself"). Under Florida law, burglary and attempted burglary are not synonymous. They are mutually exclusive.

The same is true of all of the enumerated felonies of § 924(e)(2)(B)(ii). None encompass inchoate crimes that have those felonies as their object. When Congress wanted to include an inchoate crime as an ACCA predicate, it did so in plain English. For instance, § 924(e)(2)(B)(i) includes both offenses that have as an element "the use" of physical force against another person and offenses that have as an element "the attempted use" of such force. § 924(e)(2)(B)(i). If the enumerated felonies in § 924(e)(2)(B)(ii) included attempted felonies, Congress's specific inclusion of felonies involving

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§ 924(e)(2)(B)(ii)'s residual clause. A recent Eleventh Circuit decision appears to accept the premise that the enumerated felonies of § 924(e)(2)(B)(ii) somehow encompass inchoate offenses aimed at committing those felonies. *See Wade*, 2006 WL 2195284, at *4 ("[I]f an offense is an enumerated violent felony under § 924(e)(2)(B)(ii), then the crime of attempting to commit that offense is also a violent felony").

the "attempted use" of physical force would be superfluous. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'") (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)).

It is particularly unreasonable to equate "burglary" with "attempted burglary" when Florida law treats those two offenses so differently. While a conviction for a completed burglary of a dwelling is a second degree felony punishable by up to fifteen years of incarceration, a conviction for an attempted burglary of a dwelling is only a third degree felony punishable by up to five years of incarceration. See Fla. Stat. § 777.04(4)(e) (1994) (providing that attempts to commit second degree felonies are third degree felonies)[7]; *id.* § 775.082(3)(c)-(d) (1994) (prescribing sentences for second and third degree felonies); *id.* § 810.02(3) (1994) (providing that burglary of a dwelling is a second degree felony). If Petitioner had been convicted of burglarizing a dwelling in 1997, he would have faced a fifteen-year maximum sentence—three times the sentence he faced for attempted burglary. Moreover, attempts are treated less seriously than completed crimes for purposes of Florida's sentencing guidelines and for determining an inmate's eligibility for "gain-time" under Florida Statute § 944.275. See Fla. Stat. § 777.04(4)(a) (2006).[8] Florida has made a legislative judgment to set a low threshold for attempted burglaries and to correspondingly punish an attempted burglary of a dwelling less severely than a completed burglary of a

[7] The statutory provision that provides that attempts to commit second degree felonies are treated as third degree felonies was codified at Fla. Stat. § 777.04(4)(e) in 1994 and is currently codified at § 777.04(4)(d).

[8] *See also* Fla. Stat. § 921.0012 (1994) (classifying attempted burglary as a Level 4 offense for purpose of Florida sentencing guidelines and burglary of a dwelling as a more serious Level 7 offense).

dwelling. This judgment should not be disregarded by a mechanical claim that Florida burglary convictions are somehow equivalent to Florida attempted burglary convictions for ACCA purposes.

B. Attempted Burglary Does Not Categorically "Involve[] Conduct That Presents A Serious Potential Risk Of Physical Injury To Another."

1. The Plain Language of § 924(e)(2)(B)(ii) Does Not Include Attempts.

Not only is attempted burglary not "burglary" under § 924(e)(2)(B)(ii), it does not fall within § 924(e)(2)(B)(ii)'s residual clause, either. According to the Eleventh Circuit, attempted burglary—along with an attempt or conspiracy to commit *any* of the predicate acts listed in § 924(e)(2)(B)(ii)—automatically falls within the statute's residual clause because it "involves conduct that presents a serious potential risk of physical injury to another." JA 54 ("[A]n attempt to commit an enumerated felony under § 924(e)(2)(B)(ii) constitutes a 'violent felony'"). This approach fundamentally misreads the statute and flies in the face of the categorical logic of *Taylor*.

First, the structure of § 924(e)(2)(B) demonstrates conclusively that Congress did not intend to include attempted burglaries as predicate offenses. See *United Savs. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous by isolation is often clarified by the remainder of the statutory scheme"). When Congress wanted to list attempts as ACCA predicate felonies, it did so explicitly. For example, in § 924(e)(2)(B)(i), Congress included as violent felonies offenses that have "as an element the use, *attempted use*, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). The very next clause omits this attempt language, instead listing only completed offenses: "burglary," "arson," "extortion," and crimes "involv[ing] use of explosives." *Id.*

§ 924(e)(2)(B)(ii). The juxtaposition of § 924(e)(2)(B)(i), which includes attempts, and § 924(e)(2)(B)(ii), which does not, shows that Congress made a "deliberate choice" not to include attempted burglary. *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003); see *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").[9]

Moreover, reading the residual clause of § 924(e)(2)(B)(ii) to encompass all attempts to commit enumerated felonies that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another" gives that clause an unduly broad scope. Words are known by the company they keep, and the meaning of "otherwise involves conduct that presents a serious potential risk of physical injury to another" must be interpreted by the terms that precede it—all of which describe completed offenses. The maxim of *ejusdem generis* counsels that, "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-15 (2001). Therefore, when "several items in a list share an attribute," *ejusdem generis* "counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham* v. *United States*, 511 U.S. 368, 371 (1994). This principle is particularly applicable to general catchall and residual clauses at the end of a statutory list, which ought not to be read as opportunities to insert substantially different items into the statute but instead "as bringing within a statute categories

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[9] *See also* Br. for the United States in Opp. to Pet. for Cert. at 8, *James* v. *United States*, No. 05-9264 (filed May 8, 2006) (arguing that differences in definitions of predicate felonies in § 924(e)(2) indicates that Congress used disparate phrases "intentionally and purposely").

similar in type to those specifically enumerated." *Federal Mar. Comm'n* v. *Seatrain Line, Inc.*, 411 U.S. 726, 734 (1973); see also *Circuit City*, 532 U.S. at 114-15; *Hughey* v. *United States*, 495 U.S. 411, 419 (1990).

Here, the common attribute of the predicate felonies in § 924(e)(2)(B)(ii) is completion. The statute lists burglary, arson, extortion, and crimes involving the use of explosives—not attempted burglary, attempted arson, attempted extortion, or crimes involving the attempted use of explosives. Having only enumerated completed crimes, it makes little sense to read the catchall clause as encompassing inchoate crimes. Instead, this Court should interpret the final item of § 924(e)(2)(B)(ii) to have the same attributes as all the other items—namely, completion. *Beecham*, 511 U.S. at 371.

Congress's deliberate choice to exclude attempted burglaries from § 924(e)(2)(B)(ii) is reemphasized by the fact that in 1984 it rejected a version of the ACCA that would have included attempted burglaries. The original Senate version of the ACCA provided enhanced penalties for using a firearm by persons with two prior convictions for "any robbery or burglary offense, or a conspiracy or attempt to commit such an offense." S. 52, 98th Cong. § 2 (1984), *available at* 130 Cong. Rec. 3100 (1984). The Senate passed this version on February 23, 1984. The House did not adopt a parallel version of S. 52, however. Instead, the House adopted H.R. 6248, which explicitly borrowed some language from S. 52 but did *not* include inchoate crimes.[10] H.R. 6248

[10] The final version of the ACCA borrowed the definitions of robbery and burglary from S. 52. *Compare* S. 52, 98th Cong. § 2 (1984) ("'[B]urglary offense' means any offense involving entering or remaining surrep-titiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense"), *with* Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, § 1803, 98 Stat. 2185, 2185 ("'[B]urglary' means any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense"). This

applied only to "robbery or burglary, or both." H.R. 6248, 98th Cong. § 2 (1984), *available at* 130 Cong. Rec. 28095 (1984). The Senate adopted the House version on October 4, 1984, and that version became the final ACCA. See Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185. Congress's clear decision to reject the original Senate language and to omit attempted burglary from the final version of the ACCA is a powerful indication that in 1984, it did not intend attempted burglaries to be used as predicate felonies. Congress's 1986 replacement of the "robbery or burglary" language reveals the same intent. While the 1986 revision added attempted robberies as ACCA predicates (by including offenses involving the "attempted use" of physical force in § 924(e)(2)(B)(i)), Congress did not add attempted burglaries to § 924(e)(2)(B)(ii). Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-40. This choice demonstrates that attempted burglaries are simply not encompassed by § 924(e)(2)(B)(ii).

2. Attempted Burglary Under Florida Law Is Not Categorically An Offense That "Involves Conduct That Presents a Serious Potential Risk of Physical Injury To Another."

Even if inchoate offenses could be found to "involve[] conduct that presents a serious potential risk of physical injury to another" within the meaning of § 924(e)(2)(B)(ii), attempted burglary under Florida law is not such an offense. In keeping with the ACCA's categorical approach, attempted burglary could only constitute "conduct that presents a serious potential risk of physical injury to another" if a conviction for attempted burglary *necessarily* involves such conduct. Attempted burglary cannot meet that test, particularly given

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borrowing was acknowledged in the committee report on H.R. 6248. *See* H.R. Rep. No. 98-1073, at 6 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3666 (noting that bill's definitions of robbery and burglary "are consistent with S. 52 as passed by the Senate").

Florida's expansive definition of burglary and its low standard for establishing criminal attempt.

At the time of Petitioner's conviction for attempted burglary, Florida law defined burglary as "entering or remaining in a structure or a 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." Fla. Stat. § 810.02(1) (1994).[11] This definition is significantly broader than the generic burglary of the ACCA. First, the Florida statute criminalizes the entry of "conveyance[s]" with the intent to commit an offense therein—not just the entry of "a building or other structure." *Id.* Moreover, under Florida law "dwelling" and "structure" are broad terms that include both the physical building *and* "the curtilage thereof." *Id.* § 810.011 (1)-(2) (1994). Florida law therefore "expands the definition of burglary to include not only buildings, but also the grounds around the buildings." *State* v. *Hamilton*¸ 660 So. 2d 1038, 1041 (Fla. 1995). Florida standard jury instructions reflect this broad definition. See Florida Standard Jury Instructions in Criminal Cases, 13.1. Burglary (4th ed. 2002) ("'Structure' means any building of any kind, either temporary or permanent, that has a roof over it, *and the enclosed space of ground and outbuildings immediately surrounding that structure*") (emphasis added).[12]

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[11] In 2001 Florida revised § 810.01(1) to include situations where a defendant who has been licensed or invited to enter remains "[s]urreptitiously, with the intent to commit an offense therein," remains "[a]fter permission to remain therein has been withdrawn, with the intent to commit an offense therein," or remains "[t]o commit or attempt to commit a forcible felony." Fla. Stat. § 810.02(b)(2) (2006); *see* 2001 Fla. Sess. Law Serv. 2001-58 (West).

[12] Florida standard jury instructions are published under the authority of the Florida Supreme Court and "are presumed to be correct" by Florida courts. *See Bell South Telecomms., Inc.* v. *Meeks*, 863 So. 2d 287, 292 (Fla. 2003).

Under the common law, burglary required entry into a dwelling house or entry into another structure located within the curtilage of a dwelling house. See 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.1 (2d ed. 2003); William Blackstone, 4 *Commentaries* *225 ("And if the barn, stable, or warehouse be parcel of the mansionhouse, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenants, if within the curtilage or homestall"). Burglary necessarily required entry into a *building* within the curtilage—"the breaking of the curtilage itself was not an offense." 3 LaFave, *supra* § 21.1. In Florida, however, entry into the curtilage alone will suffice. To be considered "curtilage," the grounds surrounding a building need only have "some form of an enclosure." *Hamilton*, 660 So. 2d at 1044.[13] Therefore, under Florida law, a defendant can commit burglary by entering a gate or crossing a fence surrounding a structure *even if he never enters the structure itself*. "Entry onto the curtilage is, for the purposes of the burglary statute, entry into the structure or dwelling." *Baker* v. *State*, 636 So. 2d 1342, 1344 (Fla. 1994).[14] As a result, "stealing apples from a neighbor's

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[13] Florida's interpretation of "curtilage" for purposes of its burglary statute is therefore distinct from the four-factor test for "curtilage" that this Court has articulated for Fourth Amendment purposes. *See United States* v. *Dunn*, 480 U.S. 294, 301 (1987).

[14] *See, e.g.*, *Henderson* v. *State*, 810 So. 2d 999, 1001 (Fla. 4th Dist. Ct. App. 2002) (holding that defendant committed burglary by entering carport before he attempted to enter home); *State* v. *Burston*, 693 So. 2d 600, 601 (Fla. 2d Dist. Ct. App. 1997) (holding that open carport consisting of concrete slab and roof supported by four poles was part of curtilage); *Baker* v. *State*, 622 So. 2d 1333, 1335 (Fla. 1st Dist. Ct. App. 1993) (holding that defendant committed burglary by crossing fence into yard), *aff'd*, 636 So. 2d 1342 (Fla. 1994); *State* v. *Rolle*, 577 So. 2d 997, 998 (Fla. 4th Dist. Ct. App. 1991) (per curiam) (holding that defendant committed burglary by driving truck through gate and backing in through garage door); *Greer* v. *State*, 354 So. 2d 952, 953 (Fla. 3d Dist. Ct. App.

backyard would be counted as a burglary under Florida's statute." *Pluta*, 144 F.3d at 975-76.

Florida's extension of burglary from structures to the surrounding curtilage appears to be unique. See *Hamilton*, 660 So. 2d at 1041 ("No other state has applied curtilage in the manner Florida seeks to treat it") (internal quotation marks omitted). For example, the Model Penal Code restricts burglary to "a building or occupied structure." Model Penal Code § 221.1(1). Generic burglary for ACCA purposes similarly extends only to "a building or other structure." *Taylor*, 495 U.S. at 598. Therefore, Florida's burglary statute is unquestionably non-generic. See *Pluta*, 144 F.3d at 975; *United States* v. *Adams*, 91 F.3d 114, 115-16 (11th Cir. 1996) (per curiam).

Florida does not have a statute specifically setting forth the elements of attempted burglary. Instead, attempted burglary convictions are governed by Florida's general attempt statute, Florida Statute § 777.04. Section 777.04 provides that "[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) (emphasis added). Florida courts have interpreted this to require "two general elements to establish an attempt: a specific intent to commit a particular crime, and an overt act toward its commission." *Thomas*, 531 So. 2d at 710 (footnote omitted). In addition,

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1978) (holding that defendant committed burglary by climbing six-foot wall into enclosed parking area); *T.J.T.* v. *State*, 460 So. 2d 508, 509 (Fla. 3d Dist. Ct. App. 1984) (holding that defendant committed burglary by entering fenced-in yard); *Tobler* v. *State*, 371 So. 2d 1043, 1045 (Fla. 1st Dist. Ct. App. 1979) (holding that defendant committed burglary by cutting off lock and entering gate to fence surrounding a business); *DeGeorge* v. *State*, 358 So. 2d 217, 219-20 (Fla. 4th Dist. Ct. App. 1978) (holding that defendant committed burglary by entering paved area partially enclosed by a fence and a brick wall).

"[t]he intent and the act must be such that they would have resulted, except for the interference of some cause preventing the carrying out of the intent, in the completed commission of the crime." *Ortiz*, 766 So. 2d at 1143.

The necessary "overt act" can be any "outward act in manifest pursuance of a design or intent to commit a particular crime." *Morehead* v. *State*, 556 So. 2d 523, 524 (Fla. 5th Dist. Ct. App. 1990). This act need not be a "substantial step" toward the crime, as required by the Model Penal Code and many states. See *Hudson* v. *State*, 745 So. 2d 997, 1000 n.3 (Fla. 2d Dist. Ct. App. 1999) (noting that Model Penal Code "has not been adopted in Florida" and refusing to adopt "substantial step approach" to attempt). Indeed, the Eleventh Circuit itself has recognized that Florida's use of an "overt act" standard instead of a "substantial step" standard permits Florida convictions for attempted burglaries based on conduct less "far[] advanced toward completion of the offense of burglary" than would be required in "substantial step" jurisdictions. *United States* v. *Wade*, __ F.3d __, 2006 WL 2195284, at *4 (11th Cir. Aug. 4, 2006). Nor does Florida law require a "dangerous proximity" to completion, as some states do. See *United States* v. *Andrello*, 9 F.3d 247, 249 (2d Cir. 1993) (per curiam) (discussing New York law requiring "dangerous proximity" for attempts). Instead, all that is required is "some overt act toward the commission of the [offense] which goes beyond merely thinking or talking about it." *Thomas*, 531 So. 2d at 710.

This broad definition of attempt can be satisfied in many ways. Florida courts have found attempts when a defendant breaks off criminal activity because of his suspicions that police are present[15] or his decision that the crime would not

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[15] *See Webber* v. *State*, 718 So. 2d 258, 259 (Fla. 5th Dist. Ct. App. 1998) (holding that defendant was guilty of attempted dealing in stolen property where he set up deal to sell stolen credit cards, arrived at

be profitable.[16] If a defendant has stated an intention to commit the offense, his mere presence in the vicinity is sufficient to constitute attempt.[17] In the same vein, Florida has found attempts where several steps remained before the defendant could complete the crime.[18] Indeed, a defendant could be guilty of attempt even if completion of the offense were impossible. For example, in *State* v. *Cohen*, 409 So. 2d 64, 64-65 (Fla. 1st Dist. Ct. App. 1982) (per curiam), the court found that a defendant could be convicted for attempted sale of cocaine even though the substance the defendant allegedly sold was not cocaine.[19]

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designated meeting place, and immediately left upon becoming suspicious; "[t]he overt act . . . [was defendant's] arrival at or in the vicinity of the gas station, shortly after the appointed time, with the credit cards in his possession").

[16] *See State* v. *Wise*, 464 So. 2d 1245, 1246-47 (Fla. 1st Dist. Ct. App. 1985) (finding attempted cocaine trafficking where defendant refused to accept price offered by undercover officer for drugs and broke off negotiations).

[17] *See Smith* v. *State*, 632 So. 2d 644, 646 (Fla. 1st Dist. Ct. App. 1994) (finding attempt to handle, fondle, or assault a child in a lewd, lascivious, or indecent manner where defendant made suggestive remarks to girls and drove past them four times; "the appellant's act of repeatedly driving back by the girls can properly be viewed as a direct act" to support attempt conviction); *Mercer* v. *State*, 347 So. 2d 733, 735 (Fla. 4th Dist. Ct. App. 1977) (finding attempted robbery where defendant stated intent to rob store at particular time, arrived at store at that time, and asked to see manager).

[18] For example, in *State* v. *Coker*, 452 So. 2d 1135, 1137 (Fla. 2d Dist. Ct. App. 1984), the defendant was convicted for attempted possession of a controlled substance where his only overt act was to ask a doctor to issue him a new prescription. Even though this request "was not the last possible act toward consummation of the crime"—since defendant would have to receive the prescription and present it to a pharmacist to receive the drugs—the court found this step sufficient to constitute an attempt. *Id.*

[19] *See also Hudson*, 745 So. 2d at 1001 (holding that defendant targeted by police sting using adult decoys was guilty of attempt to handle, fondle, or assault a child in a lewd, lascivious, or indecent manner where he made

In Florida, attempted burglary of a dwelling is a significantly less severe offense than burglary of a dwelling—one that can be imposed for conduct that does not approach the completed burglary, and one that Florida law treats as a less serious offense. This lesser offense does not involve conduct that necessarily presents a risk of physical injury to others, let alone a *serious* risk of such injury.

Furthermore, burglary is a property crime, and the elements of a completed burglary do not require the presence of other persons or a risk to other persons. Nevertheless, Congress included burglary as a violent felony because of its twin beliefs that burglary was often committed by "career criminals" and that a burglar's entry into a building could create a potential risk to persons within the building. See *Taylor*, 495 U.S. at 581.[20] The only "risk" presented by burglary, however, is the risk created when a burglar *enters* a building. "The fact that an offender enters a building to commit a crime . . . 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. In contrast, attempted burglary does not require

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travel arrangements for fictional child to visit him and approached taxi that he believed contained a child).

[20] The legislative history indicates that the potential risk of physical injury from completed burglaries was only one reason for including burglaries as ACCA predicates. Equally important was the fact that Congress believed that burglaries were often committed by career criminals. *See* H.R. Rep. No. 98-1073, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 3663 ("'Most robberies and burglaries are committed by career criminals'"); *see also Taylor*, 495 U.S. at 582-86 (recounting 1986 testimony at hearing on ACCA revision that "'people . . . make a full-time career and commit hundreds of burglaries'" and that "'your typical career criminal is most likely to be a burglar'" (omission in original)). The inclusion of burglary was also motivated by the belief that a burglar violates his victims' privacy and causes economic damage. H.R. Rep. No. 98-1073 at 3, *reprinted in* 1984 U.S.C.C.A.N. at 3663 ("'Burglaries involve invasion of [victims'] homes or workplaces, violation of their privacy, and loss of their most personal and valued possessions'").

any entry. In Florida, attempted burglary necessarily requires a finding that the defendant *failed* in his attempt to enter. Fla. Stat. § 777.04(1) (attempt requires proof that defendant "fail[ed] in the perpetration or [was] intercepted or prevented in the execution" of the attempted offense). Moreover, in Florida, a defendant could be convicted of attempted burglary without even attempting to enter a building. For example, a defendant could be convicted for merely casing a structure while planning a burglary, or for acting suspiciously in a frequently burglarized area.[21] A defendant who desisted in his planned burglary when he saw a security guard outside would similarly be liable.[22] Furthermore, given Florida's extension of burglary to the "curtilage," a defendant who failed in his efforts to open the fence surrounding an unoccupied structure could be guilty of attempted burglary. None of these overt acts would present the slightest risk of physical injury to another, let alone a "serious potential risk of physical injury." Indeed, Florida recognizes that attempted burglary is a "non-violent" offense. See *Ramsey* v. *State*, 562 So. 2d 394, 395 & n.2 (Fla. 5th Dist. Ct. App. 1991) (attempted burglary of a dwelling is a "non-violent third degree felony").

Even the more rigorous "substantial step" standard of the Model Penal Code would permit attempted burglary convictions for conduct that falls short of an attempt to enter. A "substantial step" under the Model Penal Code can be predicated on acts like "reconnoitering the place contemplated for the commission of the crime" or "posses-

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[21] *See, e.g.*, *Smith*, 632 So. 2d at 646 (finding attempt to handle, fondle, or assault a child in a lewd, lascivious, or indecent manner where defendant's "act of repeatedly driving back by the girls can properly be viewed as a direct act" to support attempt conviction).

[22] *See, e.g.*, *Webber*, 718 So. 2d at 259 (finding that a defendant was guilty of attempted dealing in stolen property where he set up deal to sell stolen credit cards, arrived at designated meeting place, and immediately left upon becoming suspicious).

sion . . . of materials to be employed in the commission of the crime, at or near the place contemplated for its commission." Model Penal Code § 5.01(2). Indeed, many reported cases affirm the sufficiency of attempted burglary convictions based on conduct that stops before the defendant attempted to enter. For example, attempted burglary convictions have stood where the only evidence was that the defendant was reconnoitering the property while possessing burglary tools.[23] Attempted burglary convictions likewise have been affirmed where the defendant fled the property before attempting to enter.[24] None of this conduct necessarily presents any risk of physical injury to another.

In each of these situations a defendant would have committed a sufficient overt act to create attempted burglary liability, but that overt act would create little or no risk of physical injury to others. These circumstances preclude any finding that attempted burglary convictions necessarily "involve[] conduct that presents a serious potential risk of physical injury to another." Attempted burglary convictions

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[23] *See, e.g.*, *People* v. *Jiles*, 845 N.E.2d 944, 955-57 (Ill. App. Ct. 2006) (affirming attempted burglary conviction where defendant was lurking on property with flashlight and burglary tools and finding it irrelevant that defendant "never attempted entry"); *Commonwealth* v. *Melnyczenko*, 619 A.2d 719, 720-21 (Pa. Super. Ct. 1992) (affirming attempted burglary conviction where defendant was walking through yards with burglary tools but "there was no indication that he attempted to break into any houses").

[24] *See, e.g.*, *Commonwealth* v. *Cannon*, 443 A.2d 322, 325-26 (Pa. Super. Ct. 1982) (affirming attempted burglary conviction where defendant broke through fence and then left scene after house light turned on, without attempting to enter house); *State* v. *Radi*, 542 P.2d 1206, 1208-09 (Mont. 1975) (affirming attempted burglary conviction where evidence showed that defendant left scene after attempting to open door); *Hines* v. *State*, 458 S.W.2d 666, 668 (Tex. Crim. App. 1970) (affirming attempted burglary conviction where defendant fled after light turned on without attempting to enter house).

in Florida do not inherently or necessarily involve conduct that presents such a risk.

C. The Eleventh Circuit's Decision And Other Decisions Holding That Attempted Burglary Is A Violent Felony Are Wrongly Decided.

The Eleventh Circuit's rationale for mechanically deeming any attempt to commit a predicate felony to be a predicate felony is thoroughly unconvincing. According to the Eleventh Circuit, "an inchoate crime qualifie[s] as a violent felony when its object involve[s] conduct that 'presented a serious potential risk of physical injury to another.'" JA 53 (alteration omitted). But § 924(e)(2)(B)(ii) does not apply to crimes the "object" of which would create a risk of physical injury—it only applies where the "conduct" required to prove the crime "presents a serious potential risk of physical injury to another." Under the Eleventh Circuit's rule, inchoate crimes like attempt and conspiracy are counted as predicate felonies regardless of whether the conduct required to prove those crimes ever presents a serious potential risk of physical injury. See *Wade*, 2006 WL 2195284, at *3-4; *Rainey*, 362 F.3d at 736 (holding attempted arson to be a violent felony); *United States* v. *Wilkerson*¸ 286 F.3d 1324, 1325 (11th Cir. 2002) (per curiam) (holding conspiracy to commit robbery to be a violent felony under § 924(e)(2)(B)(ii)). Indeed, the Eleventh Circuit's decision simply ignored Congress's deliberate choice to include attempts in § 924(e)(2)(B)(i) and exclude them from § 924(e)(2)(B)(ii).

Under the Eleventh Circuit's reasoning, a conspiracy to commit extortion would constitute a violent felony, even though such a conspiracy only requires proof of an "agreement" to commit the offense and an "intention" to commit the offense—not conduct that approaches the completed crime. *Corona* v. *State*, 814 So. 2d 1184, 1185 (Fla. 4th Dist. Ct. App. 2002) ("'The crime of conspiracy is comprised of the mere express or implied agreement of two or more persons to commit a criminal offense; both the

agreement and an intention to commit an offense are essential elements'") (quoting *Jimenez* v. *State*, 715 So. 2d 1038, 1040 (Fla. 3d Dist Ct. App. 1998)).[25] Likewise, an attempt to purchase explosives could be a violent felony—even if the "agreement" was made with a law enforcement officer and there was no actual prospect of completion. See, *e.g.*, *Fambo* v. *Smith*, 433 F. Supp. 590, 592-93 (W.D.N.Y.) (holding that defendant could have been convicted of attempted possession of explosives even though contents of tube of dynamite had been removed and replaced with sawdust), *aff'd*, 565 F.2d 233 (2d Cir. 1977).[26] This overinclusiveness is utterly at odds with the categorical approach of the ACCA.

The Eleventh Circuit's decision to treat all inchoate offenses as though they were completed crimes is an implicit acceptance of a position that other courts have taken explicitly—that *all* convictions for an inchoate offense will be treated as ACCA predicate felonies if "most" of the convictions will "involve[]" conduct that "'presents a serious potential risk of physical injury to another.'" *United States* v. *Custis*, 988 F.2d 1355, 1364 (4th Cir. 1993), *aff'd on other grounds*, 511 U.S. 485 (1994).[27] In *Custis*, the Fourth Circuit

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[25] The Florida standard jury instructions specifically provide: "It is not necessary that the defendant do any act in furtherance of the offense conspired." *See* Florida Standard Jury Instructions in Criminal Cases, 5.3. Criminal Conspiracy (4th ed. 2002).

[26] *See also Cunningham* v. *State*, 647 So. 2d 164, 166 (Fla. 1st Dist. Ct. App. 1994) (holding that defendant's negotiations with undercover officer were sufficient for conviction for attempted possession of marijuana); *Cohen*, 409 So. 2d at 64-65 (finding that defendant could be convicted for attempted cocaine trafficking even though the substance in question was not cocaine).

[27] The only question before this Court in *Custis* was whether a defendant in a sentencing proceeding could collaterally attack the validity of previous convictions that the prosecution sought to use to enhance his sentence under the ACCA. *See Custis* v. *United States*, 511 U.S. 485, 487 (1994). The Court was not presented with the question of whether an attempted burglary conviction could be an ACCA predicate.

held that attempted breaking and entering convictions should be treated as ACCA predicate felonies by reasoning that "[i]n most cases" the defendant would have been apprehended while in the process of entering a building. *Id.* Similarly, the Sixth Circuit has held that attempted burglary convictions ought to be counted if they "*generally* encompass[] conduct which creates a serious potential risk of injury to another person." *United States* v. *Bureau*, 52 F.3d 584, 592 (6th Cir. 1995) (emphasis added). A "possibility that [an] attempted burglary statute could encompass conduct which did not create a serious potential risk of injury to another person would not prevent us from finding that a conviction under the statute falls within the 'otherwise clause.'" *Id.* at 591; see also *United States* v. *Davis*, 16 F.3d 212, 217 (7th Cir. 1994) (holding that the residual clause will apply to crimes that create a "possibility of violent confrontation," regardless of whether "one can postulate a nonconfrontational hypothetical scenario").

Custis, *Bureau*, and *Davis* fundamentally misunderstand the categorical approach of the ACCA. If an offense could be an ACCA predicate act whenever "most" instances of the offense fell within § 924(e)(2)(B), *Taylor* would have been unnecessary. A court could similarly conclude that "most" burglary convictions are for burglary into buildings, not into automobiles, but that is not a valid reason for sentencing courts to treat convictions for non-generic burglary as ACCA predicate felonies on the ground that "most" of them are likely for generic burglary. On the contrary, the categorical approach precludes courts from using non-generic burglary convictions as ACCA predicates unless the charging documents and similar sources demonstrate that the particular conviction actually was for generic burglary.

Similarly, a nonenumerated offense can only be classified as an ACCA predicate if a conviction for that offense necessarily "involves conduct that presents a serious potential risk of physical injury to another." It is not enough to say that

a conviction will "generally" involve such conduct or that "most cases" will create such a risk. The categorical approach requires courts to find that all cases will present such a risk.

At bottom, the decisions of the Eleventh Circuit and the courts that agree with it are based on a policy judgment that attempted burglaries present similar risks as burglaries and ought to be treated the same way as burglaries. See *United States* v. *Payne*, 966 F.2d 4, 8 (1st Cir. 1992) ("So far as the risk of injury is concerned, we see little distinction between an attempted breaking and entering . . . and a completed breaking and entering"). The idea that there is no distinction between the risk presented by completed burglaries and the risk presented by attempted burglaries is flatly wrong. An "overt act" in Florida requires much less than a completed entry and correspondingly creates much less risk. See *supra* pp. 20-28. Furthermore, unlike other states, Florida convictions for attempted burglary do not require near-completion, a substantial step, or dangerous proximity to completion. This Florida law is sharply distinguishable from the Massachusetts law construed by the First Circuit in *Payne*, the New York law construed by the Second Circuit in *Andrello*, and the Illinois law construed by the Seventh Circuit in *Davis*. Even the Eleventh Circuit has recognized that Florida law requires significantly less of an "act" to establish an attempt than other states. See *Wade*, 2006 WL 2195284, at *4.

Even if attempted burglary did present similar risks as completed burglary, it is Congress's language that controls—not what courts graft onto the statute as a logical extension. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404

U.S. 336, 348 (1971).[28] Congress specifically chose not to include attempted burglary in § 924(e)(2)(B)(ii), and sentencing courts are bound to respect Congress's judgment—not reject it by reading attempted burglaries into the statute anyway.

D. The Doctrine Of Constitutional Avoidance Requires That The ACCA Be Interpreted To Prohibit Judicial Fact Finding.

"'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones* v. *United States*, 526 U.S. 227, 239 (1999). Here, the Eleventh Circuit's establishment of a *per se* rule that all attempts to commit enumerated felonies are irrebutably presumed to "present[] a serious potential risk of physical injury to another" amounts to judicial fact finding of an essential element of the offense and therefore presents serious constitutional difficulties. *Taylor* rested in part on the doctrine of constitutional avoidance. Although the *Taylor* Court did not identify the doctrine by name, the Court articulated, among the reasons for its holding, the implications for a defendant's right to a jury trial if § 924(e)(2)(B)(ii) was interpreted to permit a "factual approach." 495 U.S. at 601. Thus, the Court held that the only plausible interpretation of § 924(e)(2)(B) is that it requires the sentencing court "to look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602. In applying the doctrine of constitutional avoidance to interpret the ACCA as prohibiting findings of fact that operate to enhance a sentence significantly, the *Taylor* Court presaged this Court's later opinions in *Jones*,

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[28] *See also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 534 (1947) ("An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion").

526 U.S. at 239-40, *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004).[29]

In *Jones*, for example, the Court construed a federal criminal statute to avoid Fifth and Sixth Amendment constitutional issues stemming from judge-made findings of fact that enhanced penalties beyond the statutory maximum. While both *Jones* and *Apprendi* note that "the fact of prior conviction" is excepted from prohibited factual findings, the justification for that exception is inapplicable here. The fact of a prior conviction is exempted from Fifth and Sixth Amendment procedural safeguards because they were in place during the course of those convictions. Here, however, the factual inquiry goes beyond the fact of conviction to establish that the underlying conduct "presents a serious potential risk of physical injury to another," a fact that is neither in the statutory elements of the offense, nor in the case law interpreting attempted burglary of a dwelling. Moreover, Florida case law directly refutes the notion that an attempted burglary of a dwelling presents such a risk—attempted burglary of a dwelling is expressly described as a non-violent offense. See *Ramsey*, 562 So. 2d at 395 & n.2.

In this case, the Eleventh Circuit conducted the judicial fact finding, and in the process, the court established a *per se* rule regarding attempted burglary convictions. In fact, the creation of the *per se* rule was the court's way of conducting the judicial fact finding—all attempts are irrebutably presumed to "present[] a serious potential risk of injury to another." The Eleventh Circuit's decision that § 924(e)(2)'s element of conduct "present[ing] a serious potential risk of injury to another" can be found based on the sentencing

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[29] In *Shepard*, the Court found that where a disputed fact, although described as a fact about a prior conviction, was "too far removed from the conclusive significance of a prior judicial record," and more akin to the findings subject to *Jones* and *Apprendi*, the Court was counseled "to limit the scope of judicial factfinding on the disputed character" of the prior conviction. *Shepard*, 544 U.S. at 25-26.

court's own assumption that attempted burglary convictions will often be predicated on facts that meet that element is unadulterated fact finding—and fact finding without foundation in anything but the court's speculations about the acts that underlie "most" convictions for attempted burglary. The Eleventh Circuit's *per se* rule therefore raises even more grave constitutional questions than this Court encountered in *Taylor* and *Shepard*. Indeed, *Jones*, *Apprendi*, and *Blakely* have removed any doubt that this sort of judicial fact finding is a constitutional violation. The Court should vacate Petitioner's conviction on this ground alone and reject the Eleventh Circuit's rule in order to prevent further constitutional violations.

1. Constitutional Avoidance in the Sentencing Context.

The precise constitutional problem to be avoided here is strikingly similar to the problem that influenced the Court's interpretation of the "carjacking statute" (18 U.S.C. § 2119) in *Jones* v. *United States*, 526 U.S. 227 (1999). That statute was interpreted as defining three different crimes rather than a single crime with two aggravating factors to be determined by the sentencing judge by a preponderance of the evidence. *Id.* at 251-52. There is no question here that § 924(e) elevates the penalty parameters as severely, or even more severely, than those at issue in *Jones*.[30] Like *Jones*, the issue here is whether the sentencing court may consider facts not adjudicated in the prior proceeding in order to impose sentence for the "aggravated" version of the crime. The constitutional principle discerned in *Jones* was "under the . . . jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury,

[30] Petitioner's sentence increased from 71 months of imprisonment without the § 924(e) enhancement to 180 months of imprisonment with the enhancement. JA 37, 57.

and proven beyond a reasonable doubt." *Id.* at 243 n.6. In 1999, this principle had only been suggested by prior cases, but is now clearly established. *Apprendi*, 530 U.S. at 490; *Ring* v. *Arizona*, 536 U.S. 584, 603-09 (2002); *Blakely*, 542 U.S. at 303-04. Thus, the Court's level of constitutional concern here should rise above the level of doubt to near certainty.

In *Apprendi*, the Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Apprendi* and *Ring*, this Court concluded that the defendant's Sixth Amendment rights had been violated because the sentencing judge had "imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." *Blakely*, 542 U.S. at 303; see *Ring*, 536 U.S. at 603-09; *Apprendi*, 530 U.S. at 494-97. Similarly, in *Blakely*, the defendant's sentence was increased beyond the statutory maximum on the basis of findings of fact (that he had acted with "'deliberate cruelty'") by the sentencing judge that "were neither admitted by petitioner [in his guilty plea] nor found by a jury." 542 U.S. at 303. The Court held that the defendant's right to jury trial was violated because the judge acquired the authority to impose an enhanced sentence "only upon finding some additional fact." *Id*. at 305.

As *Apprendi* specifies, the fact of a prior conviction is an exception to this rule. This is because the certainty that the defendant received due process in the proceedings leading to the conviction ameliorates the concern that taking judicial notice of the fact of conviction violates a defendant's right to due process in a recidivist sentencing forum. 530 U.S. at 487-88; see also *Jones*, 526 U.S. at 249 ("[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

However, the confidence that the *Jones* Court had in the integrity of prior convictions is misplaced in situations where, as here, a subsequent court must engage in fact finding to resolve an ambiguity about the nature of the prior conviction.[31] Here, the application of § 924(e) turns on a *post hoc* adjudication which was not conducted in accordance with these guarantees. Whether Petitioner's attempted burglary of a dwelling conviction involved conduct presenting "a serious potential risk of physical injury to another" was not established beyond a reasonable doubt, nor admitted in the guilty plea as a fact or as an element. Nor was it likely that it would have been, as the Florida statutes involved do not require or even imply such a finding.[32]

A plain reading of the opinion in *Taylor* interdicts these constitutional concerns. Limiting *Taylor*'s reach to the fact of conviction as determined by a categorical approach cabins § 924(e) within the confines of the *Apprendi-Blakely* exception. *Shepard*, 544 U.S. at 24-26. *Taylor*'s categorical approach addresses and answers only questions of law (*e.g.*, whether the elements of the prior conviction encompass the elements of an enumerated offense or conduct under § 924(e)(2)(B)) and so does not infringe on the right to have

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[31] As noted in Justice Thomas' separate concurrence in *Apprendi*, even fact finding limited to prior conviction may itself raise the same grave and doubtful constitutional questions as fact finding in relation to other enhancements. *Apprendi*, 530 U.S. at 519-21.

[32] Although attempted burglary of dwelling in Florida does not require a finding that the conduct "presents a serious potential risk of physical injury to another," other statutes do require the jury to make such a finding. *See, e.g.*, Conn. Gen. Stat. § 53a-95 (providing that a person is guilty of unlawful restraint in the first degree – a Class D Felony – "when he restrains another person under circumstances which expose such other person to a *substantial risk of physical injury*") (emphasis added); Ind. Code § 35-42-2-2(b), (c)(2) (providing that a person is guilty of criminal recklessness – a Class D Felony – if the defendant intentionally performed an act that created a *substantial risk of physical injury to another person*) (emphasis added).

the jury assess all the facts that alter the congressionally proscribed range of penalties to which a criminal defendant is exposed. *Jones*, 526 U.S. at 253 (Scalia, J., concurring). In Petitioner's case, no jury has found that his attempted burglary of a dwelling conviction involved conduct presenting "a serious potential risk of physical injury to another."

2. The Eleventh Circuit's Interpretation of the ACCA Raises Grave Constitutional Questions.

The *per se* rule adopted by the Eleventh Circuit *requires* the sentencing court to, in essence, direct a verdict of the disputed fact, even though the disputed fact was not adjudicated in the prior proceeding. Although the Eleventh Circuit's *per se* rule avoids the kind of mini-trials discussed in *Taylor* and *Shepard*, the rule implicates additional constitutional concerns, such as the right to have a jury decide every material element of an offense. See *Gaudin*, 515 U.S. at 509-10.[33]

Petitioner did not contest the fact of his prior attempted burglary of a dwelling conviction. Petitioner did, nevertheless, contest that his prior conviction could serve as a predicate under the ACCA. The District Court expressed strong doubt "that the Florida attempt statute punishes only conduct with a severe potential risk of physical injury to another." JA 33. Nevertheless, the District Court considered itself bound by the Eleventh Circuit's ruling in *Rainey*, 362 F.3d at 735-36 (establishing a *per se* rule that an attempt to commit an enumerated felony (arson) under the ACCA constituted a violent felony). Relying on its decision in *Rainey*, the Eleventh Circuit reaffirmed its *per se* rule that an attempt to commit an enumerated felony (this time burglary)

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[33] Additionally, in *Gaudin*, the Court reiterated that deciding issues of fact, as well as mixed issues of law and fact, is a function constitutionally allocated to the jury. *Gaudin*, 515 U.S. at 513-15.

under the ACCA constitutes a violent felony. Indisputably, the court conducted judicial fact finding that went far beyond the fact of conviction.

To avoid the "grave and doubtful" Fifth and Sixth Amendment issues squarely presented by the Eleventh Circuit's *per se* rule, this Court must reaffirm its holding in *Taylor*. *Taylor*'s categorical approach allows the sentencing court to do no more than compare the statutory elements of conviction or the adjudicated elements of conviction to the elements of the sentence-enhancing clause and conclude whether they "substantially correspond." It permits no fact finding, nor should it allow a court to create a *per se* rule to direct a verdict against the defendant. With these restrictions, *Taylor*'s categorical approach involves only questions of law and avoids the grave and doubtful constitutional questions that the Court also avoided in *Jones* and the cases that followed it.

E. Under The Rule Of Lenity Any Doubt Must Be Resolved In Petitioner's Favor.

If there were any doubt about whether attempted burglary convictions were encompassed by § 924(e), the rule of lenity requires that it be resolved in favor of Petitioner. See *Bass*, 404 U.S. at 347 (stating that an ambiguity concerning the scope of criminal statutes should be resolved in favor of lenity). The rule of lenity is a manifestation of the bedrock principle that criminal statutes must provide "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). "[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). Moreover, it is equally well settled that this rule applies not only to "the substantive ambit of criminal prohibitions, but

also to the penalties they impose." *Albernaz* v. *United States*, 450 U.S. 333, 342 (1981). Here, attempted burglary is not "clearly covered" by § 924(e)(2); indeed, every applicable canon of construction suggests that attempted burglaries are *not* to be included. Under the rule of lenity, § 924(e)(2) must be given its narrowest, most reasonable reading. That reading requires that Petitioner's attempted burglary conviction not be counted as a predicate act for sentencing purposes and that the Eleventh Circuit's judgment be reversed.

F. The Eleventh Circuit's Judgment Should Be Reversed For Flatly Ignoring *Taylor* And *Shepard.*

In addition, the Eleventh Circuit's opinion in this case should be vacated because it has failed to apply *Taylor*'s categorical analysis. Even assuming that attempted burglary convictions could be treated in the same way as burglary convictions, the Eleventh Circuit failed to determine whether Petitioner's attempted burglary conviction was imposed for attempted generic burglary or attempted non-generic burglary. Instead, the Eleventh Circuit simply assumed that Petitioner's conviction for "attempted burglary of a dwelling" was attempted generic burglary. This assumption was flatly wrong in light of Florida's unique definition of "dwelling," and the Eleventh Circuit's judgment should be reversed.

As discussed above, Florida's burglary statute is unique and far broader than that of any other state. The inclusion of "curtilage" within the statutory definitions of "structure" and "dwelling" means that a Florida conviction for burglary of a dwelling or structure could be based on such conduct as crossing a fence or passing a gate—conduct that is clearly not "generic burglary" under *Taylor*. But the Eleventh Circuit never addressed the elements of Florida's burglary statute or the issue of curtilage. Nor did the Court engage in any sort of *Taylor* analysis of the charging documents from the attempted burglary to determine whether the conviction was for attempted generic burglary or attempted non-generic burglary. Hence, there was no basis for the Eleventh Circuit

to conclude that Petitioner's attempted burglary conviction was actually a conviction for attempted generic burglary. This failure to apply *Taylor* and *Shepard* requires reversal.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully Submitted,

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