NOTES

ATTEMPTED BURGLARY AS A "VIOLENT FELONY" UNDER THE ARMED CAREER CRIMINAL ACT: AVOIDING A "SERIOUS POTENTIAL RISK" OF CONFUSION IN THE WAKE OF *TAYLOR V. UNITED STATES*, 495 U.S. 575 (1990)

The Armed Career Criminal Act of 1984 ("ACCA" or "the Act")[1] is one example of how Congress has attempted to combat crime by toughening federal sentencing policies.[2] Congress enacted the ACCA to augment state law enforcement efforts against career criminals by increasing the mandatory minimum sentence for a felon in possession of a firearm conviction to fifteen years if the defendant has three predicate "violent felony" convictions.[3]

Under the ACCA, the term "violent felony" is defined, in relevant part, as any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another; or is burglary, arson, extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[4] Courts have wrestled with the interpretation of this language since the Act's passage. The final catchall provision, which addresses any "conduct [involving] . . . serious potential risk" to others ("otherwise clause" or "catchall"), has been a source of confusion and controversy among lower

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1. Pub. L. No. 98-473, 98 Stat. 2185 (1984) (codified as amended at 18 U.S.C. § 924(e) (1988)).

2. The most recent example of such legislation is the "Three Strikes and You're Out" amendment to the Federal Sentencing Guidelines. 18 U.S.C. § 3559 (1985), *amended by* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. This legislation mandates life imprisonment for a criminal with three "serious violent felonies" or "serious drug offenses." *Id.*

3. 18 U.S.C. § 924(e) (1988).

4. *Id.* The full text of § 924(e)(2)(B) is as follows:

> [T]he 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.

18 U.S.C. § 924(e)(2)(B) (1988).

courts, particularly when the crime of attempted burglary is involved.[5]

Attempted burglary is particularly difficult to analyze under the statutory language of the ACCA because it does not necessarily involve the use (either actual, attempted or threatened) of force against another person and because Congress did not specifically include it as a predicate offense in the language of the Act.[6] Thus, if a sentencing court uses a defendant's prior attempted burglary conviction for purposes of sentence enhancement, it must consider the offense one that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[7] However, attempted burglaries can involve a wide variety of conduct, only some of which create a "serious potential risk" that a person will be injured. In the absence of congressional guidance as to which crimes should fall within the catchall,[8] judges have experienced difficulty interpreting the provision's ambiguous language.[9] Consequently, federal district and appellate courts have disagreed on when or whether a previous attempted burglary conviction comes under the amorphous umbrella of the otherwise clause.[10]

In 1990, the Supreme Court provided a flicker of illumination on this issue in *Taylor v. United States*.[11] The *Taylor* decision did not, however, focus on the language of the otherwise clause. Rather, it concentrated on the definition and treatment of burglary as it appears in the language preceding the otherwise clause.[12] Nonetheless, virtually every court that has faced the attempted burglary question under the ACCA has turned to *Taylor* for guidance, presumably because *Taylor* is the only Supreme Court

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5. Some circuits have held that attempted burglary is not a "violent felony" for purposes of the ACCA, while others have held the opposite. For a discussion of the circuit split, see *infra* notes 82-145 and accompanying text.

6. Although § 924(e)(2)(B)(ii) specifically lists, among other crimes, "burglary" as a predicate offense, courts agree that "burglary" does not include attempted burglary for purposes of the ACCA. *See, e.g.*, United States v. Thomas, 2 F.3d 79, 80 (4th Cir. 1993) (finding that attempted burglary "does not contain the elements required for 'burglary' as that term is used in § 924(e)").

7. *See supra* note 4.

8. For a discussion of the ACCA's legislative history, see *infra* notes 21-43 and accompanying text.

9. *See, e.g.*, United States v. Sherbondy, 865 F.2d 996, 1010 (9th Cir. 1988) (finding that the manner in which § 924(e) is to be construed is not readily apparent); United States v. Headspeth, 852 F.2d 753, 758 (4th Cir. 1988) (indicating that the catchall language is ambiguous). For a discussion of these cases, see *infra* notes 44-60 and accompanying text.

10. For a discussion of the circuit split, see *infra* notes 82-145 and accompanying text.

11. 495 U.S. 575 (1990). In *Taylor*, the Supreme Court explained that Congress included burglary as a specifically enumerated offense under § 924(e)(2)(B)(ii) because it involved an inherent risk of injury to people who might interrupt a burglar during the commission of the offense. *Id.* at 587-88.

12. For a discussion of *Taylor*, see *infra* notes 61-81 and accompanying text.

decision that purports to interpret the language of § 924(e)(2)(B)(ii), and because attempted burglary is similar in nature to burglary.[13]

According to *Taylor*, when a sentencing court determines whether a prior burglary offense can be counted as a "violent felony" under § 924(e)(2)(B)(ii), it may only look to the statutory elements of the prior offense, and not to the facts underlying the conviction.[14] However, because the elements of state attempt statutes are vague and substantially similar to one another,[15] district courts have encountered difficulties when applying this "categorical approach" to prior attempted burglary offenses. Thus, sentencing courts often turn to state attempt case law[16] to determine whether a defendant's prior attempted burglary necessarily involved elements that presented a potential risk of injury to others.[17]

When courts employ the categorical approach and analyze the crime of attempted burglary under state attempt case law, they often reach anomalous and unfair results. In some jurisdictions, a defendant may receive an

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13. Several appellate courts have concluded that attempted burglary and burglary pose almost the same risk of injury to others due to the possibility that a property owner may return while the attempt is in progress, or that a neighbor or law enforcement official may interrupt the offender in the course of the crime. For a discussion of cases holding that both attempted burglary and burglary pose the same risk of injury, see *supra* notes 84-125 and accompanying text.

14. *Taylor*, 495 U.S. at 602. *Taylor* recognized that the "Courts of Appeals uniformly have held that § 924(e) mandates a formal categorical approach" and agreed with the reasoning of these courts. *Id.* at 600. *See also* United States v. Chatman, 869 F.2d 525, 529 (9th Cir. 1989); United States v. Sherbondy, 865 F.2d 996, 1006-10 (9th Cir. 1988); United States v. Vidaure, 861 F.2d 1337, 1340 (5th Cir. 1988), *cert. denied*, 489 U.S. 1088 (1989); United States v. Headspeth, 852 F.2d 753, 758-59 (4th Cir. 1988). For a discussion of the "categorical approach," see *supra* notes 53-57, 75-81 and accompanying text.

15. The Model Penal Code ("MPC") states that one is guilty of attempt if one "purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." MODEL PENAL CODE § 5.01(1)(c) (1985). The MPC adds the caveat that the conduct must be "strongly corroborative of the actor's criminal purpose." *Id.* § 5.01(2). States that do not expressly adopt the MPC definition of attempt often use similar language. For a discussion of the MPC definition of attempt and its use by the majority of states, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 508-09 (2d ed. 1986). *See also* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 15-16 (1989).

16. Statutory attempt language, such as "substantial step," has little practical meaning until courts interpret such language in the context of the actual offense. Thus, although state attempt language is similar, the meanings that courts impose upon the language are often very different. *Compare* People v. Peters, 371 N.E.2d 156 (Ill. App. Ct. 1977) (holding defendant not guilty of attempted burglary because there was no evidence that he actually attempted to enter a building) *with* State v. Vermillion, 832 P.2d 95 (Wash. Ct. App. 1992) (convicting defendant of attempted burglary for casing neighborhood, selecting house to burgle, and possessing neckties to be used in burglary).

17. *See infra* notes 104-25 and accompanying text.

enhanced sentence for a prior attempted burglary conviction that did not involve a "serious potential risk of physical injury" to others.[18] In other jurisdictions, a defendant may avoid an enhanced sentence for a prior attempted burglary conviction that clearly involved such a risk.[19] Such inconsistent interpretations subject defendants to arbitrary adjudications, undermining a goal of the Supreme Court—that similary-situated defendants recieve uniform treatment—depending on how a particular court chooses to apply *Taylor* to analysis of attempted burglary.[20]

This Note offers a judicial solution that would allow courts to fairly and uniformly analyze the issue of attempted burglary under the catchall provision of the ACCA. Part I reviews the ACCA's legislative history. Part II describes early attempts by federal appellate courts to interpret the otherwise clause and the Supreme Court's treatment of the term "burglary" as enumerated in the language immediately preceding the clause. Part III examines the conflict among the circuits over how to approach the attempted burglary question. Finally, Part IV proposes a generic attempted burglary statute that would give each circuit a categorical framework for analyzing attempted burglaries under the ACCA.

I. LEGISLATIVE HISTORY

Congress originally enacted the ACCA in 1984.[21] The Act addressed Congress' growing concern that a large number of violent crimes and thefts were being committed by a very small percentage of repeat offenders and

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18. Courts generally agree that merely possessing burglary tools, casing a potential burglary site, making duplicate keys, and similar conduct do not pose the same risk of injury as an actual physical attempt to enter a building or structure. *See, e.g.*, United States v. Weekley, 24 F.3d 1125, 1127 (9th Cir. 1994) (recognizing that an attempted burglary conviction based on casing a home or possessing burglary tools would not involve the kind of risk-creating conduct with which Congress was concerned).

Some courts have misconstrued the categorical approach to mean that because most attempted burglaries involve potentially risky conduct, all attempted burglaries may be used for purposes of sentence enhancement. *See, e.g.*, United States v. Custis, 988 F.2d 1355 (4th Cir. 1992). *See also infra* notes 84-125 and accompanying text. This approach ignores the very real possibility that a prior attempted burglary may have involved less than an actual physical entry or near entry into a building or structure.

19. Some circuits have misinterpreted the categorical approach to mean that because some attempted burglaries do not involve risky conduct, attempted burglaries cannot be used for purposes of sentence enhancement. For a discussion of these cases, see *infra* notes 126-40 and accompanying text. In those circuits, a defendant may escape an enhanced sentence for a prior attempted burglary that involved actual physical entry or near entry into a building or structure.

20. United States v. Taylor, 495 U.S. 575, 590-92 (1990).

21. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (1984), *repealed by* Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, § 104, 100 Stat. 458 (1986).

that robbery and burglary were the crimes most frequently committed by these criminals.[22] Under the original version of the Act, any convicted felon found guilty of possession of a firearm who had three previous convictions for either robbery or burglary received a mandatory minimum fifteen year sentence.[23]

In 1986, the ACCA was recodified under the Firearms Owners' Protection Act.[24] Five months after the 1986 recodification, Congress amended the ACCA to its current form.[25] Prior to the Act's final enactment, however, members of Congress vigorously debated the definition of "violent felony." The opposing factions introduced two rival bills with different definitions that varied in scope.[26]

The first bill,[27] which was introduced in both the Senate and the House, omitted the words "robbery or burglary" from the original version and instead provided that any "crime of violence" would count as one of the three predicate convictions required for sentence enhancement.[28] The bill defined "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or any felony "which, *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[29] The proponents

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22. H.R. REP. NO. 98-1073, 98th Cong., 2d Sess., at 1, 3 (1984). *See also* S. REP. NO. 98-190, 98th Cong., 1st Sess. 5 (1983).

23. The Senate Report stated that burglary was included because it is one of "the most common violent street crimes" and "[w]hile burglary is sometimes viewed as a non-violent crime, its character can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is still on the premises." S. REP. NO. 98-190, 98th Cong., 1st Sess., 4-5 (1983).

24. Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, § 104, 100 Stat. 458 (1986) (codified at 18 U.S.C. § 924 (e)). The 1986 Act included minor amendments to the 1984 text of the ACCA. Congress amended the definition of burglary by replacing the words "any felony" with "any crime punishable by a term of imprisonment exceeding one year." *Id.*

25. Pub. L. No. 99-570, 100 Stat. 3207-39 (1986) (codified at 18 U.S.C. § 924(e)).

26. *Compare* S. 2312, 99th Cong., 2d Sess. (1986) and H.R. 4639, 99th Cong., 2d Sess. (1986) *with* H.R. 4768, 99th Cong., 2d Sess. (1986). For a discussion of the opposing bills, see *infra* notes 26-41 and accompanying text.

27. S. 2312, 99th Cong., 2d Sess. (1986); H.R. 4639, 99th Cong., 2d Sess. (1986). This bill was introduced in the Senate by Senator Specter and in the House by Representative Wyden. *See* S. 2312, 99th Cong., 2d Sess. (1986); H.R. 4639, 99th Cong., 2d Sess. (1986).

28. S. 2312, 99th Cong., 2d Sess. (1986); H.R. 4639, 99th Cong., 2d Sess. (1986).

29. S. 2312, 99th Cong., 2d Sess. (1986) (emphasis added); H.R. 4639, 99th Cong., 2d Sess. (1986) (emphasis added). It should be noted that this language is, with the exception of the words "or property," identical to the language that defines "serious violent felonies" in the "Three Strikes and You're Out" provision of the Violent Crime Control and Law Enforcement Act of 1994. *See* 18 U.S.C.

of this bill hoped to broaden the Act's scope.[30]

The drafters of the opposing bill[31] sought to narrow the Act's scope by limiting the crimes that would count towards sentence enhancement. Like the first bill, the opposing bill struck the terms "robbery or burglary" from the original version, instead adding the term "violent felony."[32] "Violent felony" included only state and federal felonies that have as an element the "use, attempted use, or threatened use of physical force against the person of another."[33] Supporters of the first, more expansive bill criticized this proposal for its failure to include burglary, arson, and other violent crimes against property.[34] Although these crimes did not have the actual or threatened use of force against the person as an element, the supporters of the first bill argued that they were crimes which, by their nature, posed a severe and inherent danger to human life.[35]

Congress ultimately drafted an amendment that struck a compromise between the opposing bills.[36] Both factions agreed that the definition of "violent felony" should include crimes that have the actual, attempted or

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§ 3559 (1985), *amended by* Pub. L. No. 103-322, 108 Stat. 1796 (1994).

30. When Senator Specter introduced Senate Bill 2312, he stated that since the enhancement provision had thus far been "successful with the basic classification of robberies and burglaries as the definition for 'career criminal,' the time has come to broaden that definition so that we may have a greater sweep and more effective use of this important statute." 132 CONG. REC. 7697 (1986) (statement of Sen. Specter).

31. H.R. 4768, 99th Cong., 2d Sess. (1986). This bill was introduced by Representatives Hughes and McCollum.

32. *Id.*

33. *Id.*

34. *See, e.g., 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. 9, 23-24 (1986) (statement of Rep. Wyden); *Id.* at 23-24 (statement of James Knapp, Deputy Ass't Attorney General, Crim. Div., U.S. Dept. of Justice).

35. *Id.*

36. H.R. 4885 was favorably reported by the House Committee on the Judiciary. H.R. REP. NO. 99-849, 99th Cong., 2d Sess. (1986). The draft of the compromise bill, H.R. 4885, included "violent felony" as a predicate offense, and provided that:

> The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. REP. NO. 99-849, at 7.

The Subcommittee on Crime agreed that part (ii) of this draft would:

> [A]dd 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.

Id. at 3.

threatened use of force against others as an element of the offense.[37] Congress also broadened the scope of the term "violent felony" by including the catchall provision.[38] However, the catchall did not include crimes that, by their "very nature," involved a "substantial risk" of physical force against the "person or property" of others.[39] Rather, only crimes that presented a "serious potential risk" of physical injury to "another [person]" were included.[40] Moreover, the amendment, as finally enacted, specifically enumerated burglary, arson, extortion, and the use of explosives as part of the definition of "violent felony" in § 924(e).[41]

Attempt crimes have never been specifically designated as predicate offenses under any version of the ACCA.[42] Moreover, the legislative history is virtually silent on the issue of whether Congress envisioned attempt crimes, particularly attempted burglary, to fall under the catchall

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37. This provision is consistent with the language of the second bill, H.R. 4768. *See supra* text accompanying notes 31 and 32.

38. See *supra* note 4 for the language of the catchall provision.

39. One of the proposed bills included in the definition of "crime[s] of violence" any felony "which, *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *See supra* note 29 and accompanying text. Prior to *Taylor*, two federal appellate decisions held that the final form of the catchall really refers to crimes which, *by their nature*, create a risk of harm to others. For a discussion of these cases, see *infra* notes 44-60 and accompanying text.

40. For the full text of the current version of the ACCA's definition of "violent felony," see *supra* note 4.

41. The provision that was finally enacted included the language, *"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)(ii) (1988) (emphasis added).

The Supreme Court concluded that the compromise bill, H.R. 4885, implicitly considered burglary and the other offenses enumerated in the final version of the bill as offenses that "involve[] conduct that presents a serious potential risk of physical injury to another." United States v. Taylor, 495 U.S. 575, 587 (1990). The last-minute addition of the enumerated offenses "seemingly was meant simply to make explicit the provision's implied coverage of crimes such as burglary." *Id.* at 589.

42. There are, however, other federal sentencing instruments that specifically include attempt crimes for purposes of sentence enhancement. For example, the United States Sentencing Guidelines ("USSG") define "crime of violence" using almost the exact same language the ACCA uses to define "violent felony":

> [A]ny offense under federal or state law punishable by imprisonment for a term exceeding one year that—
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

UNITED STATES SENTENCING GUIDELINES [U.S.S.G.] § 4B1.2(1) (1995). Application Note One to the guidelines states that the term "crime of violence" includes attempts to commit the offenses enumerated in the guidelines. *Id.* § 4B1.2 n.1.

provision.[43] Although Congress failed to offer any specific examples of offenses that might be covered by the otherwise clause in § 924(e), the Fourth and Ninth Circuits have attempted to answer this question.

II. JUDICIAL INTERPRETATION OF § 924(e)(2)(B)(ii)

A. *Circuit court decisions addressing the language of the otherwise clause before* Taylor.

Prior to the Supreme Court's decision in *Taylor*, at least two circuits confronted the issue of what crimes Congress intended the otherwise clause in § 924(e)(2)(B)(ii) to encompass. Although those courts did not analyze attempted burglary under the ACCA, they attempted to define the scope of the otherwise clause for purposes of other crimes not expressly listed in § 924(e)(2)(B)(ii).

In *United States v. Headspeth*,[44] the Fourth Circuit Court of Appeals addressed whether the crime of storehouse breaking[45] was an "otherwise" offense.[46] The court noted that the "otherwise" clause was ambiguous[47] and elucidated two possible interpretations of the provision.[48] First, the court stated, one could interpret the otherwise clause to refer to only offenses which, "by their very nature," present a risk of injury to the person.[49] Or, the court continued, one could read this language as referring

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43. *See* 130 CONG. REC. 3100 (1984). However, Senate Bill 52, which was never enacted, specifically enumerated predicate offenses for sentence enhancement as "any robbery or burglary offense, or a conspiracy or *attempt* to commit such an offense . . . ." *Id.*

44. 852 F.2d 753 (4th Cir. 1988).

45. Under Maryland law, the offense of "storehouse breaking" is defined as:

> [B]reaking [into] a storehouse, filling station, garage, trailer, cabin, diner, warehouse or other outhouse or into a boat in the day or night with an intent to commit murder or felony therein, or with the intent to steal, take or carry away the personal goods of another of the value of $300 or more therefrom . . . .

Id. at 756 (citing MD. CODE ANN. art. 27, § 32 (1987)).

46. *Headspeth*, 852 F.2d at 758-59. Because this case was decided before Taylor v. United States, 495 U.S. 575 (1990), the Fourth Circuit did not have the benefit of *Taylor*'s analysis of the term "burglary." *Id.* at 599. The court therefore concluded that the definition of "burglary" did not include the offense of storehouse breaking and analyzed storehouse breaking under the otherwise clause. 852 F.2d at 758-59. Although *Taylor*, in effect, overruled *Headspeth*, *Headspeth* remains relevant in light of the Fourth Circuit's attempt to interpret the meaning and application of the otherwise clause. *Id.*

47. *Id.* at 758.

48. *Id.* at 758-59.

49. *Id.* at 758. The court noted that this was the language proposed by the drafters of H.R. 4639, the more inclusive of the two proposals that eventually resulted in the current provision in § 924(e). *Id.* For a discussion of H.R. 4639 and its companion bill in the Senate, S. 2312, see *supra* notes 27-30 and accompanying text. The Fourth Circuit reasoned that this interpretation may be the most plausible,

to crimes that, under the facts and circumstances of their commission, *actually* posed such a risk.[50] Whether the crime, in its generic sense, posed an inherent risk to an individual was irrelevant. The court concluded that the rule of lenity required the court to adopt the narrower interpretation of the statutory language.[51] Thus, the Fourth Circuit held that the otherwise clause is limited to offenses that, "as defined, pose *by their very nature* a serious potential risk of injury to another."[52]

In *United States v. Sherbondy*,[53] the Ninth Circuit Court of Appeals agreed with the Fourth Circuit's interpretation of the otherwise clause,[54] but took its interpretation one step further. The Ninth Circuit decided, based on the legislative history of § 924(e) and the extreme practical difficulties associated with conducting "ad hoc mini-trials" to determine the nature of prior offenses,[55] that the otherwise clause is a "generalized version of the

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because the specifically enumerated crimes preceding the catchall (burglary, arson, extortion, and use of explosives) are all offenses that "by their very nature obviously pose an inherent risk of injury to the person." *Headspeth*, 852 F.2d at 758. Based on this view of the otherwise clause, storehouse breaking is not a violent felony. It does not inherently involve a risk of injury to people because the crime, by its very nature, involves unoccupied buildings. *Id.*

50. *Id.* The court based its interpretation on the fact that the statute in its current form does not contain the limiting language, "by its nature." *Id.* Thus, one can interpret the language as including any crime that actually involves risky behavior. Under this interpretation of the otherwise clause, the specific storehouse breaking at issue constituted a violent felony because the defendant heaved a brick through the plate glass window of a jewelry store. *Id.*

51. The court acknowledged that since "the legislative history and other extrinsic sources offer no guidance in resolving the ambiguity [of the otherwise clause] . . . ," the rule of lenity required that the ambiguity be resolved in favor of the accused. *Headspeth*, 852 F.2d at 759.

The rule of lenity is a "well-established principle of statutory construction" which requires that "ambiguities in criminal statutes must be resolved in favor of lenity for the accused." *Id.* (*citing* United States v. Bass, 404 U.S. 336, 347 (1971) and Rewis v. United States, 401 U.S. 808, 812 (1971)). The court continued to explain that the policy of lenity "means that the [Supreme] Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Id.* (*citing* Ladner v. United States, 358 U.S. 169, 178 (1958)).

52. *Id.* at 758-59. The court determined that the crime of "storehouse breaking" was not a crime that "by its very nature" posed an inherent risk of injury to the person because it generally involves unoccupied buildings. *Id.* at 758.

53. 865 F.2d 996 (9th Cir. 1988). The *Sherbondy* court specifically addressed the issue of whether a prior conviction for witness intimidation constituted a violent felony under the otherwise clause of § 924(e). *Id.* at 1005.

54. *Id.* at 1006.

55. *Id.* at 1008. The court elaborated upon the practical problems that accompany such factual inquiries:

> Witnesses would often be describing events years past. Such testimony is highly unreliable . . . . [T]he witnesses might be persons who did not even testify at the earlier criminal proceeding. In many cases, witnesses to the events in question might be unavailable altogether. Additionally, there would likely be substantial problems with court records and

categorical approach."[56] Thus, according to the Ninth Circuit, Congress intended the otherwise clause to reach other statutory and common-law offenses that inherently involve a similar serious risk of harm but are not covered by § 924(e)(2)(B)(i).[57]

The court provided two examples of crimes that, according to its analysis, would constitute "otherwise" offenses—manslaughter and kidnapping.[58] The court explained that although manslaughter does not include physical force as a categorical element of the offense, it is still a crime that "by its nature" involves the death of another person and is

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> transcripts relating to earlier convictions. These problems become especially difficult . . . where, because the conviction was based on a guilty plea, there is little or no contemporaneous record developed.

Id.

The court also recognized that there may be an "intermediate approach" to factual inquiries under the statute. *Id.* at 1008 n.16. Under this approach, a sentencing court should only look to the "court records of prior convictions." *Id.* The court explicitly noted that a court should not "limit [its] analysis to the category of offense committed [] or conduct a full hearing into the individual facts of the defendant . . . ." *Id.* The *Sherbondy* court also illustrated the substantial evidentiary problems that accompany what it dubbed the "intermediate approach":

> The record would still be deficient in those cases where convictions were the result of guilty pleas. Individual judges would have to determine whether to consider the more subjective portions of the record, including pre-sentence and probationary reports and the comments and opinions of the trial judge.

Id.

The *Sherbondy* court refused to adopt the "intermediate approach" because of practical difficulties and apparent lack of congressional intent. *Id.* However, the Supreme Court overlooked the potential flaws of the "intermediate approach" and adopted a substantially similar approach two years later in Taylor v. United States, 495 U.S. 575 (1990) (holding that a court can look to the indictment or information and jury instructions to determine what elements of the offense the defendant was charged with and what the jury necessarily had to find in order to convict). For a further discussion of the *Taylor* decision and the "categorical approach," see *infra* notes 75-81 and accompanying text.

56. *Sherbondy*, 865 F.2d at 1008. The court observed that "Congress consistently discussed subsection (ii) in categorical terms . . . ." *Id.* The court concluded:

> [T]he "otherwise" clause [is not] an indication by Congress of its intention to abandon the categorical approach it uses throughout the section in favor of one that requires courts to examine individual acts in the case of the unspecified offenses; rather we construe it as an attempt to set forth a general description that serves to expand the intended categories beyond the four explicitly listed.

Id.

The court found it unlikely that Congress would, in the absence of express language in the Act, authorize "ad hoc mini-trials" to determine the specific conduct involved in an individual's prior offense. *Id.* at 1008.

57. *Id.* at 1009. For the language of § 924(e)(2)(B)(i), see *supra* note 4.

58. *Id.* The court explained that kidnapping and involuntary manslaughter do not have the use of force, either actual, attempted or threatened, as an element of the offense. *Id.* Thus, they are not specifically enumerated in the first part of subsection (ii), but "are covered by the final clause of subsection (ii)." *Id.*

"highly likely to be the result of violence."[59] Likewise, violence is not necessarily an element of kidnapping, but the court concluded that because the offense entails a "'serious potential risk of physical injury' to the victim," it is a "violent felony" under subsection (ii).[60] Based on the above analysis and examples, it is not likely that the *Sherbondy* court would consider attempted burglary a crime that "by its nature" presents a serious risk of injury to another person.

B. Taylor's *interpretation of "burglary" and its categorical approach to § 924(e)(2)(B)(ii)*

The Supreme Court's 1990 decision in *Taylor v. United States*[61] is critical to the circuits' analysis of whether attempted burglary is a "violent felony" under the ACCA. In *Taylor*, the Court defined and explained the term "burglary" as it appears in the first part of § 924(e)(2)(B)(ii).[62] Since *Taylor*, the question of whether attempted burglary constitutes an "otherwise" violent felony has appeared in almost every federal appellate court.[63] As the only Supreme Court decision that interprets the language of § 924(e)(2)(B), *Taylor* has proven to be a tempting tool for lower courts attempting to analogize between the closely related crimes of burglary and attempted burglary.

In *Taylor*, the defendant pleaded guilty to the crime of possession of a firearm by a convicted felon.[64] At the time of his plea, the defendant had four prior convictions, two of which were for second degree burglary under Missouri law.[65] Pursuant to the ACCA, the district court judge imposed upon Taylor a fifteen year minimum sentence enhancement.[66] Taylor appealed, arguing that his burglary convictions should not count for purposes of sentence enhancement because they did not involve "conduct

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59. 865 F.2d at 1009.

60. *Id.*

61. 495 U.S. 575 (1990).

62. *Id.* The first part of § 924(e)(2)(B)(ii) specifically includes the offenses of burglary, arson, kidnapping, and the use of explosives in the definition of "violent felony." 18 U.S.C. § 924(e)(2)(B)(ii) (Supp. 1994). For the full text of § 924(e)(2)(B), see *supra* note 4.

63. Before *Taylor*, no federal appellate court had addressed the question of whether attempted burglary was a violent felony under the ACCA. Search of WESTLAW, Allfeds database for cases before 1990 (Mar. 3, 1995). This fact seems to imply that *Taylor* expanded the reach of § 924(e) by giving prosecutors and sentencing courts a way to include attempted burglary as a predicate offense for purposes of sentence enhancement.

64. *Taylor*, 495 U.S. at 578.

65. *Id.*

66. *Id.* at 579.

that present[ed] a serious potential risk of physical injury to another" under § 924(e)(2)(B)(ii).[67] The Eighth Circuit affirmed Taylor's enhanced sentence and held that because the term "burglary" in § 924(e)(2)(B)(ii) "means 'burglary' however a state chooses to define it," the district court was correct in using Taylor's second degree burglary convictions to enhance his sentence.[68] Thus, the Supreme Court granted certiorari[69] to decide what Congress meant by the term "burglary," as specifically enumerated in § 924(e)'s definition of "violent felony."[70]

The Court recognized that Congress included burglary as an enumerated offense under § 924(e)(2)(B)(ii) because it inherently posed a serious potential risk of physical harm to others.[71] According to the Court, this inherent danger arises from the likelihood that people will either be present in the building or structure when the burglar enters or will arrive on the scene while the burglar is still on the premises.[72] The Court stated that "the offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape."[73] Therefore, the Court concluded that "burglary" ought to be defined in generic terms, "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[74]

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67. 495 U.S. at 579.

68. *Id.*

69. 493 U.S. 889 (1989).

70. *Taylor*, 495 U.S. at 579-80. The Court granted certiorari specifically to "resolve a conflict among the Courts of Appeals concerning the definition of burglary for purposes of § 924(e)." *Id.* The circuit courts were divided on the question of whether Congress meant the term "burglary" in § 924(e)(2)(B)(ii) to be defined according to the common-law definition of burglary, how an individual state labeled its statute, or a generic definition based on that in the MPC. *Id.* at 580. The common law defines burglary as "a breaking and entering of a dwelling at night with the intent to commit a felony." *Id.* at 592. The generic definition of burglary is defined as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

71. *Taylor*, 495 U.S. at 588.

72. *Id.* at 581.

73. *Id.* at 588. This section of the *Taylor* opinion had a profound impact on many of the subsequent cases dealing with attempted burglary. Several circuits have reasoned that attempted burglary is an "otherwise" offense because it poses the same inherent risk of harm as burglary—that the attempted burglar will employ violent means to complete the offense or to escape capture. For a discussion of these cases, see *infra* notes 84-125 and accompanying text.

74. *Id.* The Court based its conclusion on the legislative history and congressional intent behind § 924(e)(2)(B). *Id.* at 581-90. The generic definition of burglary was originally included in the 1984 draft of the ACCA. *Id.* at 598. The definition was omitted in subsequent drafts and was not replaced with a different or narrower one. *Id.* Moreover, no alternative definition was ever discussed. There is

The Court also adopted the "categorical approach" and held that § 924(e)(2)(B)(ii) generally requires the sentencing court to look only to the statutory definitions of the prior offense the defendant was convicted of, and not to the underlying facts of those convictions.[75] The Court reached

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some indication in the Act's legislative history that the exclusion of the burglary definition was inadvertent. *Id.* at 598-99. The Court decided that "there simply is no plausible alternative that Congress could have had in mind." *Id.*

The generic burglary definition adopted by the Court in *Taylor* is substantially identical to that adopted by the drafters of the MPC. Under the MPC, "[a] person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." MODEL PENAL CODE § 221.1 (1980).

75. *Id.* at 600. The Court decided that "the only plausible interpretation of § 924(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 601. Because the Court specifically referred to § 924(e)(2)(B)(ii) and the last phrase of this section includes the otherwise clause, courts that have analyzed the attempted burglary question under the otherwise clause often interpret *Taylor* as explicitly holding that the otherwise clause is confined to a categorical analysis. *See, e.g.*, United States v. Custis, 988 F.2d 1355, 1363 (4th Cir. 1992) (recognizing that the Supreme Court has made it clear that uniform sentencing under § 924(e) requires a categorical approach).

However, it is not at all clear that the Court intended to impose the categorical approach upon the otherwise clause. The Court granted certiorari in *Taylor* to determine the meaning of burglary, *not* to interpret the meaning and scope of the otherwise clause. *Id.* at 579-80. In fact, the very first sentence of the Court's opinion announces, "[i]n this case we are called upon to determine the meaning of the word 'burglary' as it is used in . . . § 924(e)." *Id.* at 577. Moreover, the text of the *Taylor* opinion strongly suggests that the Court would not (or could not) analyze all "catchall" crimes categorically. The Court noted in a footnote that its concern was "only to determine what offenses should count as 'burglaries' for enhancement purposes." *Id.* at 600 n.9. Immediately following this disclaimer, the Court recognized that the government "remain[ed] 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.'" *Id.* Only after setting forth this limiting language did the Court concede that "§ 924(e) mandates a formal categorical approach." *Id.* at 600. Because the Court explicitly divorces the otherwise clause from its analysis of the definition of "burglary," it appears that the Court did not intend its holding to extend beyond the enumerated predicate offenses listed in the first part of § 924(e)(2)(B)(ii).

Furthermore, it is difficult to imagine how the Court could categorically analyze "any offense" under the otherwise clause. For example, *Taylor* held that all generic burglaries pose an inherent risk of physical injury to others. *See supra* notes 71-74 and accompanying text. However, the Court considered other burglaries, such as the burglary of an automobile or a vending machine, beyond the scope of the term "burglary" (and presumably not inherently risk-creating). *Id.* at 599. Thus, in order to include a broader type of burglary as a prior predicate offense for sentence enhancement, courts must seek refuge in the otherwise clause. According to the Supreme Court, however, only burglaries that have the basic elements of unlawful entry into a building or other structure with the intent to commit a crime inherently pose a risk of harm to others. According to *Taylor*, a non-generic burglary such as the burglary of a vending machine does not categorically set forth elements that would inherently pose a potential risk of harm to others. Thus, the only way to determine whether a non-generic burglary, such as the burglary of a vending machine, involved risk-creating conduct would be to examine, in some fashion, the facts surrounding the individual occurrence.

this conclusion by looking to the statute's plain language[76] and legislative history[77] and by elaborating upon the practical difficulties and potential unfairness inherent in fact-specific inquiries.[78]

At least one circuit concluded that *Taylor* precludes district courts from conducting factual inquiries only in situations where the offenses specifically enumerated in the first part of subsection (ii) are concerned. United States v. John, 936 F.2d 764 (3d Cir. 1991). In *John*, the Third Circuit held that district courts have discretion to consider the facts underlying predicate convictions when determining whether a prior crime was a "crime of violence" under § 4B1.2 of the USSG. *Id.* at 765, 770-71. Because the USSG's definition of "crime of violence" is virtually identical to the ACCA's definition of "violent felony," the Third Circuit relied on *Taylor* and explained that:

> The sum and substance of *Taylor* is that for purposes of what we have called the first prong—i.e., crimes specifically enumerated—the government may not attempt to prove by reference to actual conduct that a prior conviction constitutes a "violent felony" when the crime for which the defendant was convicted does not conform to the generic, common law definition.

Id. at 769. *John*, however, involved the USSG, not the ACCA. No court that has analyzed attempted burglary under the ACCA has ever ruled similarly.

76. *Taylor*, 495 U.S. at 600. The Court observed that the language of § 924(e) refers to offenders who have three previous "*convictions*" for three prior violent felonies or drug offenses as opposed to offenders who have "*committed*" three prior violent felonies or drug offenses. *Id.* (emphasis added). Based on Congress' choice of words, the Court concluded that Congress "intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories and not to the facts underlying the prior convictions." *Id.* The Court also pointed out that § 924(e)(2)(B)(i) defines "'violent felony' as any crime punishable by imprisonment for more than a year that '*has as an element*'—not any crime that, in a particular case, involves—the use or threat of force." *Id.* (emphasis added). The Court relied on this distinction to infer that "the phrase 'is burglary' in § 924(e)(2)(B)(ii) most likely refers to the elements of the statute of conviction, not to the facts of each defendant's conduct." *Id.* at 600-01.

77. *Id.* at 601. The Court stated that "[i]f Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate fact finding process regarding the defendant's prior offenses, surely this would have been mentioned somewhere in the legislative history." *Id.* Moreover, the Court pointed out that in the 1984 version of the ACCA, "robbery" and "burglary" were defined in the text of the statute. *Id.* at 588. Thus, "Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled 'robbery' or 'burglary' by the laws of the State of conviction." *Id.* at 588-89. For further discussion of the legislative history of the ACCA, see *supra* notes 21-43.

78. *Id.* at 601. The Court noted that in some cases, "only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic burglary." *Id.* In order to illustrate the practical difficulties and potential unfairness that arise via the fact-finding approach, the Court raised the following questions and issues:

> Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed generic burglary? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to

The Court further recognized that when a defendant has been convicted under a state statute that is defined more broadly than the generic definition of burglary,[79] the government is not necessarily precluded from seeking an enhanced sentence.[80] The Court thus allows a sentencing court to go beyond the mere fact of conviction and examine the indictment or information and jury instructions to determine whether the defendant was charged with and whether the jury had to find that the defendant's state law crime of burglary met all the elements required for generic burglary.[81]

III. MODERN DOCTRINE IN THE WAKE OF *TAYLOR*

Since the Supreme Court defined burglary as it appears in § 924(e)(2)(B)(ii), the question of whether attempted burglary is a violent felony under this section of the ACCA has arisen in almost every federal appellate court.[82] Given that there are no pre-*Taylor* cases dealing with attempted burglary under the ACCA,[83] one could infer that prior to *Taylor* most courts did not consider attempted burglary as a crime that Congress envisioned within the ambit of the otherwise clause. Thus, although the Supreme Court in *Taylor* purported only to define the term "burglary," it essentially provided the means for prosecutors and sentencing courts to broaden the scope of § 924(e). The following analysis reveals that the circuits are divided and often misguided in their treatment and analysis of this issue.

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burglary.

Id. at 601-02. For a further discussion of the practical difficulties associated with "ad hoc mini-trials," see *supra* note 55.

79. The Court pointed out that some states' burglary statutes "define burglary more broadly, e.g., by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings." 495 U.S. at 599.

80. *Id.* at 602. The Court wanted to ensure that district courts could still use the categorical approach to reach prior burglary convictions that actually encompassed all the elements of generic burglary but were obtained under state burglary statutes that were broader than the generic definition of burglary.

81. *Taylor*, 495 U.S. at 600. This approach strongly resembles the "intermediate approach" described in United States v. Sherbondy, 865 F.2d 996, 1008 n.16 (9th Cir. 1988). Under the *Sherbondy* court's definition of the "intermediate approach," a sentencing court would be allowed to examine the "court records of prior convictions." *Id.* For a discussion of *Sherbondy* and the intermediate approach, see *supra* note 55. Additionally, for a discussion of how courts have liberally construed this part of the *Taylor* holding to mean that courts may look at many other documents besides charging papers and jury instructions, see *infra* note 155.

82. The Eleventh Circuit is the only circuit that has not addressed this issue. Search of WESTLAW, Allfeds database (Mar. 3, 1995).

83. Search of WESTLAW, Allfeds database (Mar. 3, 1995).

A. Courts that have held that attempted burglary is a "violent felony" under the ACCA

1. Attempted burglary is always a "violent felony" because it involves the same potential risk of harm to others as burglary.

Some circuits have held that attempted burglary is always a violent felony under the ACCA because it is a crime that *usually* involves the same potential risk of injury to others as burglary. These circuits employ a strict categorical approach and allow sentence enhancement if the state statute defines attempted burglary as presenting the same risk of injury to others as burglary. Whether the attempted burglary actually involves such risk-creating conduct is irrelevant.

In *United States v. Custis*,[84] the Fourth Circuit found no significant difference between attempted burglaries and burglaries.[85] In *Custis*, the defendant argued that his prior attempted breaking and entering[86] conviction was not a "violent felony" because, under Maryland law, attempted breaking and entering involves conduct such as lying in wait or reconnoitering the location of the intended burglary site, neither of which presents a risk of injury to others.[87] Relying on *Taylor*, the court rejected this assertion and stated that because the Supreme Court requires a "formal categorical approach" when interpreting § 924(e)(2)(B)(ii), a court may look only to the statutory definition of the prior offenses and not to the particular facts underlying those convictions.[88] Under the statutory definition of breaking and entering in Maryland, the crime's location must be "a dwelling house of another."[89] The court concluded that because such a building is likely to be occupied, an attempt to illegally enter a dwelling categorically meets *Taylor*'s generic definition of burglary and necessarily presents the same risk of injury to others as if the defendant were actually inside the home.[90]

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84. 988 F.2d 1355 (4th Cir. 1992), *aff'd on other grounds*, 114 S. Ct. 1732 (1994).

85. *Id.* at 1363-64.

86. For purposes of this analysis, there is no significant difference between attempted burglary and attempted breaking and entering.

87. 988 F.2d at 1363.

88. *Id.*

89. *Id.* (construing MD. ANN. CODE art. 27, § 31A (1987)).

90. *Id.* The court assumed that the defendant had attempted to illegally enter an occupied dwelling but offered no proof that his attempt actually reached the requisite level of completion. *Id.* at 1364. *See also* United States v. Payne, 966 F.2d 4 (1st Cir. 1992). The *Payne* court explained that "the risk of

The Fourth Circuit addressed this issue again in *United States v. Thomas*.[91] In *Thomas*, the New Jersey burglary statute used to convict the defendant was broader than *Taylor*'s generic definition of burglary[92] because it included places such as cars, ships, and airplanes in its definition of "structure."[93] According to *Taylor*'s analysis, the extra elements in New Jersey's statute required the court to look to the charging papers and jury instructions to determine if a jury was required to find that the prior offense actually involved a building or structure.[94] However, the Fourth Circuit failed to examine such documents and merely followed its decision in *Custis* by holding that attempted burglary, as defined by New Jersey law, qualifies as a violent felony under the ACCA.[95]

In *Custis*, the Fourth Circuit erroneously applied *Taylor* to the attempted breaking and entering law at issue in that case. In *Taylor*, the Supreme Court stated that the reason why burglary is an enumerated felony under the ACCA is because of the likelihood that people will be present in a building or structure when a burglar enters or will arrive on the scene when the burglar is still engaged in the offense.[96] The risk of harm inherent in burglary is that "[t]he offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape."[97] The Fourth Circuit decided that because the structure at issue had to be a "dwelling house of another,"[98] and people would probably be present in such a dwelling, the attempted breaking and entering

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injury arises, not from the completion of the break-in, but rather from the possibility that some innocent party may appear on the scene while the break-in is occurring." *Id.* at 8. The court continued, stating: "[This] possibility may be at its peak while the defendant is still outside trying to break in, as that is when he is likely to be making noise and exposed to the public view." *Id. See also* United States v. O'Brien, 972 F.2d 47, 51 (3d Cir. 1992) (citing United States v. Payne, 966 F.2d 4 (1st Cir. 1992)); United States v. Fish, 928 F.2d 185, 187 (6th Cir. 1991).

91. 2 F.3d 79 (4th Cir. 1993).

92. *Taylor* held that "burglary" as defined by the ACCA 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. For a discussion of *Taylor*, see *supra* notes 61-81 and accompanying text.

93. N.J. STAT. ANN. § 2C:18-1 (West 1982). Under New Jersey law, a person is guilty of burglary if he enters a "structure" with the intent to commit an offense therein. *Id.* § 2C:18-2. A structure is defined as "any building, room, ship, vessel, car, vehicle or airplane, and also means any place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." *Id.* § 2C:18-1.

94. *Taylor*, 495 U.S. at 602.

95. *Thomas*, 2 F.3d at 80.

96. *Taylor*, 495 U.S. at 588.

97. *Id.*

98. *See supra* note 89.

necessarily posed the same level of risk as the completed offense.[99] This reasoning ignores the fact that in some states, a defendant can be convicted of attempted breaking and entering or attempted burglary for a variety of actions, most of which fall short of actual physical attempts to enter a building. In the state of Maryland, where the offense at issue in *Custis* occurred, it is possible that the defendant was convicted of attempted breaking and entering merely because he was casing a neighborhood or "lying in wait."[100] Because it is less likely that an attempted burglar will employ violence to escape a premises he/she has never entered or has not yet come close to entering, the *Taylor* "risk of harm" rationale would not necessarily apply to attempted burglaries that involve something less than an actual physical attempt to enter a building.[101]

Moreover, the Fourth Circuit took no steps to determine if the defendant's prior attempted burglary conviction involved an actual attempt to enter a dwelling. The court failed to examine the charging papers and jury instructions to determine whether, in order to convict, the jury necessarily had to find that the defendant was caught trying to illegally enter a dwelling.[102] The court also failed to examine state attempted breaking and entering cases to determine whether a person could be convicted of attempted breaking and entering in Maryland if the person failed to physically attempt to enter a dwelling. Without making these inquiries, it is impossible for the court to accurately assert that attempted breaking and entering in Maryland truly presents the same potential risk of harm as burglary.

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99. *Custis*, 988 F.2d 1355. *See also* United States v. Lane, 909 F.2d 895 (6th Cir. 1990). In *Lane*, the court held that even though the defendant failed to complete the attempted burglary, his actions still posed a serious potential risk of harm to others. *Id.* at 903. The court examined Ohio's burglary law, noting that burglary in that state requires that the burglarized structure be occupied. The court also examined Ohio's attempt statute, which stated that to convict a defendant of an attempt, the defendant must have intended to carry out the completed crime and engaged in conduct in furtherance of committing the crime. *Id.* Thus, the court concluded, attempted burglary in Ohio possessed the same potential for violent confrontation as burglary. *Id.* However, the court overlooked the fact that "conduct toward the commission of that crime" could entail behavior that falls short of physical entry or near entry into a building.

100. *See supra* note 87.

101. *See infra* note 146 and 147 and accompanying text.

102. The Supreme Court permits a court to examine the charging papers, jury instructions, and other information when the state statute is broader than *Taylor*'s generic definition of burglary. *Taylor*, 495 U.S. at 602. Because in many states a person may engage in conduct that does not qualify as an attempt to actually illegally enter an occupied building, a court should be required to examine court documents to determine whether the defendant's conviction actually involved attempted physical entry into an occupied building.

The New Jersey burglary statute cited in *Thomas* was, in fact, broader than the definition of generic burglary in *Taylor*.[103] Therefore, it is possible that Thomas' prior attempted burglary conviction could have involved a car or some other structure. Because the Supreme Court found in *Taylor* that such burglaries do not pose a serious enough risk to others to be considered burglary for purposes of § 924(e)(2)(B)(ii), an attempt at such burglaries would likewise lack a serious potential risk of injury to others. Thus, in the Fourth Circuit, a court may use a defendant's prior attempted breaking and entering conviction for purposes of § 924(e)(2)(B)(ii) sentence enhancement even though the prior offense may not have involved an actual entry or near entry into a dwelling. Such an offense, arguably, does not involve conduct that poses a serious potential risk of injury to others.

2. *Attempted burglary is a "violent felony" because state statutes and case law illustrate that attempted burglary always involves conduct that poses a risk of violent confrontation equal to completed burglary.*

In accordance with *Taylor*'s mandate that courts must analyze § 924(e)(2)(b)(ii) crimes according to the statutory elements rather than the underlying facts of the prior offense, some circuits look to state burglary and attempt statutes, as well as case law concerning attempt crimes, to determine if an attempted burglary posed a sufficiently similar risk of harm as burglary and could therefore be considered a "violent felony." The prevailing rationale behind this line of cases is that state attempt statutes or, more specifically, the judicial interpretation of such statutes clearly indicate that there is little difference between attempted burglary and burglary. Thus, based on this rationale in the state of conviction, an attempted burglary will necessarily always involve conduct that poses a serious potential risk of physical injury to others. However, only the Seventh Circuit convincingly employs state case law to support this assertion.

In *United States v. Davis*,[104] the Seventh Circuit held that the defendant's conviction for attempted burglary under Illinois law was a "violent felony" under the ACCA.[105] The court first examined the Illinois attempt statute, which, like many others, requires the defendant to have the

103. *See supra* note 93.
104. 16 F.3d 212 (7th Cir. 1994).
105. *Id.* at 219.

intent to commit the crime and to commit an act constituting a "substantial step" towards the commission of the offense.[106] The court recognized that because courts disagree about the meaning of the "substantial step" language, the language of the attempt statute, standing alone, is of little significance.[107] Thus, the court turned to Illinois case law to determine how close to the completion of burglary a defendant must come to be convicted of attempted burglary.[108]

The court determined that to be convicted of attempted burglary under Illinois law, the defendant must come within "dangerous proximity to success."[109] The court cited several Illinois cases which held that a defendant must actually attempt to enter a building to be convicted of attempted burglary.[110] Thus, the court concluded that there is little difference between the risk of violent confrontation in attempted burglary and burglary.[111]

Using the same rationale set forth in *Davis*, other circuits have held that attempted burglary is a "violent felony." However, case law in the states of conviction fails to support the conclusion that attempted burglary is a "violent felony" under the ACCA.

In *United States v. Andrello*,[112] the Second Circuit held that attempted burglary is a "violent felony" because under New York law, a person can only be convicted of attempted burglary if he engages in conduct that comes within "dangerous proximity" to completion of the offense.[113] However, a close examination of New York case law reveals that a defendant need not have physically attempted to enter a structure to be

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106. 16 F.3d at 217. The Illinois attempt law is similar to the one found in the MPC. *Compare* 720 ILL. COMP. STAT. 518/4 (1994) *with* MODEL PENAL CODE § 5.01(1)(c) (1985).

107. *Davis*, 16 F.3d at 217.

108. *Id.* at 218.

109. *Id.*

110. *Id.* In People v. Peters, a jury convicted the defendants of attempted burglary because they were found crouching behind a garbage container with a ladder resting against the building beside them, and someone inside the building had heard footsteps on the roof. 371 N.E.2d 156 (Ill. App. Ct. 1977). However, the appellate court reversed the conviction because "there [was] no evidence whatsoever that they actually made any attempt to enter the building." *Id.* at 157. In People v. Ray, the jury convicted the defendant of attempted burglary because he was arrested behind a building carrying a crow bar, holding a flashlight, and wearing gloves. 278 N.E.2d 170 (Ill. App. Ct. 1972), *rev'd on other grounds*, 297 N.E.2d 168 (Ill. 1973). Once again, the Illinois Court of Appeals reversed the conviction because there was no evidence that the defendant had attempted to enter the building. *Id.* at 172-73.

111. *Davis*, 16 F.3d at 218.

112. 9 F.3d 247 (2d Cir. 1993).

113. *Id.* at 249.

convicted of attempted burglary. In *People v. Sullivan*,[114] the Court of Appeals of New York held one defendant guilty of attempted burglary merely because he possessed burglary tools and went to a building with the intent to illegally enter it, despite the fact that he was frightened away while inspecting the premises.[115] Thus, in the Second Circuit, it is possible that a defendant could receive an enhanced sentence for past attempted burglary convictions that did not, in fact, pose a serious potential risk of physical injury to others.

Other courts have relied on unconvincing state attempt case law to support a claim that there is no significant difference between attempted and completed burglary. In *United States v. Payne*,[116] the First Circuit held that a Massachusetts conviction for attempted breaking and entering was a violent felony for purposes of the ACCA.[117] To be convicted of attempted burglary in Massachusetts, a defendant must have "an intention to commit the underlying offense" and must commit "an overt act toward its commission."[118] The "overt act" must bring the defendant close enough to the intended crime site to risk violent confrontation.[119]

The First Circuit cited to *Commonwealth v. Ortiz*[120] to support its assertion that attempted burglary was a "violent felony." In that case, the Supreme Judicial Court of Massachusetts held that a defendant who had placed a loaded firearm in the front seat of an automobile and gone in search of an enemy could not be convicted of attempted assault and battery with a dangerous weapon.[121] The *Payne* court reasoned that according to *Ortiz*, a defendant who obtains burglary tools and sets out for the intended burglary site would not engage in "overt acts" sufficient to constitute attempted breaking and entering.[122] The court further inferred from *Ortiz*

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114. 65 N.E. 989 (N.Y. 1903).

115. *Id.* In *Sullivan*, the defendant and an accomplice agreed to commit a burglary on a specified evening. When they arrived at the intended burglary site, they discovered that the tools they had brought with them were inappropriate to carry out the break-in. They subsequently left to visit a blacksmith shop and obtain a crowbar. Before they were able to secure a crowbar, however, they were arrested. *Id.* at 992.

116. 966 F.2d 4 (1st Cir. 1992).

117. *Id.* at 9.

118. *Id.* (citing Commonwealth v. Ortiz, 560 N.E.2d 698 (Mass. 1990)).

119. *Id. See also* United States v. Lane, 909 F.2d 895, 903 (6th Cir. 1990) (examining Ohio burglary and attempt law and concluding that defendant's prior attempted burglary conviction constituted a "violent felony" under the ACCA).

120. 560 N.E.2d 698 (Mass. 1990).

121. *Payne*, 966 F.2d at 9 (citing *Ortiz*, 560 N.E.2d 698).

122. *Id.*

that, when attempted breaking and entering is at issue, an "overt act" would have to involve conduct such as "coming onto the premises and being scared off or trying and being unable to break the lock."[123]

The *Payne* court's comparison of attempted assault and battery with attempted burglary is unconvincing. *Ortiz* only suggests that a defendant should not be convicted of attempted breaking and entering for driving near the intended burglary site with the proper tools. *Ortiz* does not foreclose the possibility that a defendant could be convicted of attempted breaking and entering when the defendant is on or near the premises, but did not engage in conduct that posed a serious potential risk to others.[124] Thus, *Payne* provides another example of how a defendant may receive an enhanced sentence based on prior offenses that were not truly "violent felonies."[125]

B. Courts holding that attempted burglary is not a "violent felony" under the ACCA

1. Attempted burglary is not a "violent felony" in states that broadly define the offense to include acts that may not involve a risk of violent confrontation.

The Tenth and Fifth Circuits have concluded that attempted burglary is *never* a "violent felony" under the ACCA because, according to the law of the state in which the defendant was convicted, it is possible that a predicate offense may not have involved the requisite risk-creating

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123. 966 F.2d at 9.

124. *Payne* fails to acknowledge that a defendant who comes onto the premises, and is for whatever reason scared off, does not pose the same risk of injury to others as a defendant who is scared off by a person who appears on the scene and interrupts a would-be burglar while a break-in is occurring. A would-be burglar could be scared off the premises for a number of reasons, never coming in contact with another person. For example, a would-be burglar could be on the premises, lurking in the bushes with burglary tools, and be scared off when he or she realizes that the intended burglary site is protected by a watchdog or a security system.

125. In United States v. Soloman, the Eighth Circuit adopted an approach very similar to the First Circuit's approach in *Payne*. 998 F.2d 587, 590 (8th Cir.), *cert. denied*, 114 S. Ct. 639 (1993). In *Soloman*, the Eighth Circuit held that attempted burglary, as defined by Minnesota law, is a "violent felony" under the ACCA. *Id.* The court looked to Minnesota case law to define conduct that creates a serious potential risk of physical injury to others. *Id.* at 590. However, the relevant case, State v. Geshick, merely held that "preparation, without an overt act or an attempt to commit the intended crime, is not enough to sustain a conviction for attempt." *Id.* (citing State v. Geshick, 168 N.W.2d 331 (Minn. 1969)). As the Seventh Circuit has indicated, United States v. Davis, 16 F.3d 212 (7th Cir. 1994), such language, by itself, is of little significance. *See supra* notes 104-11.

conduct.[126] Under this approach, these courts recognize that not every attempted burglary creates the same risk of injury as burglary. Consequently, in states where the attempt statutes or attempted burglary case law requires only a minimal level of risk to convict a defendant of attempted burglary, these circuits will not count any attempted burglaries towards sentence enhancement. Thus, unlike most other circuits, a defendant who attempts to physically enter a building or structure will not receive an enhanced sentence.

In *United States v. Strahl*,[127] the Tenth Circuit determined that, under Utah's "substantial step" attempt statute,[128] a defendant could be convicted of attempted burglary for engaging in relatively non-risk-creating conduct such as possessing burglary tools or casing the potential burglary site.[129] The court reasoned that attempt convictions based upon conduct falling significantly short of a completed offense, do not properly fall within the ambit of the otherwise clause because, unlike a completed or nearly completed burglary, such offenses would not pose a risk of violent confrontation.[130]

The Tenth Circuit addressed this issue again four months later in *United States v. Permenter*.[131] In *Permenter*, the Tenth Circuit found that the defendant's prior attempted burglary conviction was not an "otherwise" offense. Relying on an approach similar to that employed in *Strahl*, the Tenth Circuit determined, without the aid of any case law, that under Oklahoma's broad attempt statute, a defendant could be convicted for non-risky conduct such as casing a potential burglary site.[132] Unlike *Strahl*, however, in *Permenter*, the charging papers clearly stated that the defendant

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126. United States v. Permenter, 969 F.2d 911 (10th Cir. 1992); United States v. Strahl, 958 F.2d 980 (10th Cir. 1992); United States v. Martinez, 954 F.2d 1050 (5th Cir. 1992).

127. 958 F.2d 980 (10th Cir. 1992).

128. The Utah attempt statute is similar to the MPC provision. *Compare* UTAH CODE ANN. § 76-4-101 (1995) *with* MODEL PENAL CODE § 5.01(1)(c) (1985).

129. 958 F.2d at 986. The court stated that under Utah law, attempted burglary convictions may "include conduct well outside § 924(e)'s target of 'violent' felonies." *Id.* Such conduct may include "making a duplicate key, 'casing' the targeted building, obtaining floor plans of a structure, or possessing burglary tools." *Id.* However, the Tenth Circuit failed to present any state attempt case law to support its assertion.

130. *Id.*

131. 969 F.2d 911 (10th Cir. 1992).

132. The Oklahoma attempt statute provides: "Every person who attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable . . . ." *Id.* at 913 (citing OKLA. STAT. tit. 21, § 42 (1991)). Similar to the rationale espoused in *Strahl*, the court stated that "[b]ecause 'any act' may count, a defendant may be found guilty of attempted burglary for merely 'casing' the targeted structure." *Id.*

had been arrested while prying open the back door of a building.[133] The court examined the elements of Oklahoma's attempt statute, noting that *Taylor's* requirement of "unlawful or unprivileged entry" was not met on the statute's face.[134] Adhering to *Taylor*'s categorical approach, the court reasoned that the conviction did not unequivocally meet the elements of generic burglary because the charging papers or jury instructions did not allege actual entry into a building.[135]

Similarly, in *United States v. Martinez*,[136] the Fifth Circuit held that attempted burglaries in Texas do not constitute violent felonies for purposes of the otherwise clause of § 924(e)(2)(B)(ii).[137] The court gave two reasons for its holding. First, the court stated that if Congress meant to include attempted burglary under § 924(e), it would have done so expressly.[138] Second, the court rejected the assertion that attempted burglary presents the same risk of violent confrontation as burglary under Texas law.[139] Unlike the Tenth Circuit in *Martinez*, the Fifth Circuit reached its conclusion by examining the relevant Texas attempted burglary

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133. *Permenter*, 969 F.2d at 913. In *Permenter*, the defendant's information charged:

> The crime of attempted burglary in the second degree was feloniously committed . . . by Charles Martin Permenter who willfully and knowingly attempted to break and enter a building, known as Dice's Mobile Homes . . . by prying open rear door . . . but was prevented from completing the act by arriving of police officers . . . .

Id. at 913 n.1.

134. *Id.* at 913.

135. *Id.* The court adopted a strict reading of *Taylor* and refused to recognize that a potential for violent confrontation exists when a defendant is outside a building trying to break in. *Id.*

136. 954 F.2d 1050 (5th Cir. 1992).

137. *Id.* at 1053.

138. *Id.* The court noted that "if Congress believed that the attempt should be treated the same way as the crime itself, it could have said so with virtually no effort." *Id.* In fact, the Fifth Circuit held that attempted burglary was a "crime of violence" under a different sentencing statute where Congress expressly enumerated attempt crimes as predicate offenses in the text of the statute. In United States v. Guerra, 962 F.2d 484, 485-86 (5th Cir. 1992), the court held that attempted burglary was a "crime of violence" for purposes of the USSG where "burglary of a dwelling" was an enumerated predicate offense in § 4B1.2 of the USSG and Application Note one to § 4B1.2 stated that the term "crime of violence" includes attempts to commit the offenses enumerated in the USSG. *See also* United States v. Jackson, 986 F.2d 312 (9th Cir. 1993) (counting prior attempted burglary conviction for sentencing purposes); Dino Privitera, Recent Decision, *Criminal Law—Federal Sentencing Guidelines: Expanding the Definition of Crime of Violence Under the Career Offender Provision*—United States v. John, 936 F.2d (3d Cir. 1991), 65 TEMP. L. REV. 1001 (1992) (criticizing overly expansive interpretations that count prior attempted burglary convictions such as that in United States v. John, 936 F.2d 764 (3d Cir. 1991)).

139. *Id.* at 1054. The court stated that "while some attempted burglary does indeed present some risk of potential harm, that risk simply does not rise to the same level of risk presented by burglary." *Id.*

case law, which stated that a defendant may be convicted of attempted burglary even if there is no entry into a building or habitation.[140]

2. *Attempted burglary is not a "violent felony" if the state statute permits convictions for non-risky conduct and the charging instruments or plea agreements indicate that the defendant's conduct did not pose a risk of violent confrontation.*

In *United States v. Weekley*,[141] the Ninth Circuit recognized that, like Utah and Texas, Washington allows a defendant to be convicted of attempted burglary for "substantial step" conduct that poses little risk of physical harm to others.[142] Moreover, the court proved this assertion by citing to Washington state attempted burglary case law.[143] However, the *Weekley* court did something the Fifth and Tenth Circuits did not: it conceded that conduct involving something less than actual entry into a building could still create the possible risk of physical injury to another person.[144] The court applied *Taylor's* categorical approach, holding that because nothing in the charging instruments or plea agreement indicated that the defendant's conduct entailed entry or near entry into a building, his prior attempted burglary conviction could not be used for sentence enhancement under § 924(e).[145]

IV. PROPOSAL

Sentencing courts must adopt a more uniform approach when considering the question of whether attempted burglary is a violent felony for purposes of sentence enhancement under § 924(e)(2)(B)(ii) of the ACCA. Unless Congress clarifies exactly what crimes it meant to include in the catchall

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140. The court cited Molenda v. State, 715 S.W.2d 651, 653 (Tex. Crim. App. 1986), to support the proposition that "any act amounting to more than mere preparation that tends but fails to effect a burglary constitutes attempted burglary." *Martinez*, 954 F.2d at 1053.

141. 24 F.3d 1125 (9th Cir. 1992).

142. *Id.* at 1127.

143. To support its propositions, the *Weekley* court cited Washington v. Vermillion, 832 P.2d 95, 101 (Wash. Ct. App. 1992) (finding that "substantial step" shown by casing neighborhood, selecting house to burgle, and possessing neckties to be used in burglary) and State v. Henderson, 792 P.2d 514 (Wash. 1990) (finding that "substantial step" does not require violation of property or entry onto curtilage).

144. 24 F.3d at 1127. The court held: "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." *Id.* (emphasis added).

145. *Id.*

provision of § 924(e)(2)(B)(ii), the Supreme Court must act to ensure that this complex issue receives uniform treatment.

As a starting point, courts need to agree on how close to completing the burglary a defendant must come in order to consider the prior offense one that involved a serious potential risk of physical injury to others.[146] This Note adopts the reasoning of the majority of circuits that have addressed the attempted burglary question: An attempted burglary that comes within dangerous proximity of completion—i.e., involves an actual physical attempt to enter a building or structure—poses virtually the same inherent risk of physical harm to others as generic burglary.[147] If courts can agree

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146. Most courts agree that the risk involved when an innocent homeowner or bystander interrupts a burglar trying to illegally enter a premises is almost or equally as great as the risk involved when a burglar is discovered inside the home.

147. This author realizes that given the current political climate with respect to crime control, arguing that a nearly completed burglary does not pose the same potential risk of violent confrontation as burglary would be an exercise in futility. However, there is some question as to whether an attempted burglary that does not involve an actual physical entry into a structure would encompass conduct risky enough to justify enhancing a convicted felon's sentence by fifteen years. Compare the following hypothetical scenarios and consider whether, on a practical level, the potential risk of harm they pose to others is similar:

> 1) A husband and wife return home late one evening. They arrive to find their front door open and visibly damaged. The couple enters the home, unaware of the intruder they have interrupted. Curious to see whether their belongings are intact, the couple proceeds upstairs to examine the second floor. Unbeknownst to them, the intruder is still lurking in their second floor bedroom contemplating her escape. To escape this situation, the burglar must either exit the home through a second story window or physically move past the couple, who is either in the doorway of the bedroom or still in the cramped stairwell. If the burglar is to avoid apprehension, she will probably physically confront the couple.
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> 2) A husband and wife are away from their home late one evening. Meanwhile, a potential burglar is attempting to pry open the side door of the couple's house with a crowbar. A neighbor happens to glance out of his window and see what he believes to be a burglar trying to enter his neighbor's home. Instead of calling the police, he decides to confront the burglar face to face. He walks towards his neighbor's side door and yells in his best ex-Marine voice, "whattaya think you're doin' over there, punk?" Because the would-be burglar is not confined to the inside of the home, she need only to flee in one of several possible directions to avoid apprehension.

According to the Supreme Court, the risk of injury associated with burglary arises from the possibility that the burglar will be interrupted during the act, and resort to violence to escape capture or carry out his/her plans. *Taylor*, 495 U.S. at 588. Consequently, an "otherwise" offense must involve a "serious potential risk" that an attempted burglar will use violence to complete the offense or escape capture. However, statistics demonstrate that burglars prefer to commit their crimes in the daytime to reduce the risk of violent confrontations. David B. Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 ST. LOUIS U. PUB. L. REV. 285, 346 (1993) (citing PAT MAYHEW, RESIDENTIAL BURGLARY: A COMPARISON OF THE UNITED STATES, CANADA, AND ENGLAND AND WALES (1987) (citing 1982 British Crime Survey)). Moreover, roughly only 13% of residential burglaries in the United States are attempted against occupied homes. *Id.* If the weather forecast called for a 13% chance of rain, would you consider that a "serious potential risk" of rain?

that specific elements of attempted burglary exist that, if present, pose an inherent potential risk of violent confrontation, they will be able to categorically analyze all attempted burglary offenses.[148]

To ensure that district courts can effectively analyze attempted burglary under the otherwise clause in a uniform and categorical manner, the Supreme Court should adopt a generic attempted burglary definition that corresponds with the "generic burglary" definition it adopted in *United States v. Taylor*.[149] The Court's generic burglary definition states the basic elements of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[150] Similarly, the generic attempted burglary definition should state:

> A person is guilty of attempted burglary if he or she unlawfully or without privilege, enters a building or structure, or uses physical force to attempt to enter a building or structure, or remains in or attempts to remain in, a building or structure, with intent to commit a crime.

The preceding definition requires that the defendant actually attempt to enter a building using some form of physical exertion.[151] If the defendant's attempted burglary does not contain this element, the prior offense should not be used for purposes of sentence enhancement. Moreover, if the burglary site is something other than a building or structure, then the prior attempt should be similarly excluded.[152]

In most instances, the state will have to prove that the prior offense

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148. District courts should adhere to the categorical approach because appellate courts uniformly recognize that "the practical difficulties and potential unfairness of a factual approach are daunting." United States v. Taylor, 495 U.S. 575, 600 (1990). Furthermore, a court should not examine state attempt case law to determine whether a defendant's prior offense necessarily involved the elements of generic attempted burglary because such an approach is unfair and inaccurate. Very few courts can accurately determine whether a prior offense involved a physical or near entry into a building by merely looking to state attempt case law. For a discussion of cases applying state attempt law, see *supra* notes 104-25 and accompanying text.

149. 495 U.S. 575 (1990).

150. *Id.* at 598.

151. The term "physical force" would include any physical exertion upon a structure with the purpose of gaining entry. Such exertion would include conduct ranging from simply shaking a doorknob to smashing a window or prying a door open with a crowbar.

152. The Supreme Court left unresolved the question of how a sentencing court should approach a situation where the prior burglary or attempted burglary did not occur in a building or structure (i.e., a car, booth, vending machine, or boat). *Taylor* left open the possibility that when an attempted or completed burglary involves something other than a "building or structure," a court may examine the facts and circumstances surrounding the prior offense to determine whether it involved conduct that posed a serious risk of injury to others. For a discussion of *Taylor*'s categorical approach, see *supra* note 75 and accompanying text.

contained the elements of generic attempted burglary by looking to the charging papers, jury instructions, or other available documents.[153] The only way district courts can prove, with the utmost certainty, that the predicate offense satisfies all the elements of generic attempted burglary, is with the Supreme Court's explicit permission to use every available reliable means[154] to categorically make this showing. Most lower courts have already interpreted *Taylor* as allowing sentencing courts to examine a wide variety of court documents, including trial transcripts and pre-sentence reports, to prove the elements of a prior offense.[155] Therefore, the Supreme Court should adopt the majority position and clarify its holding to explain that when a sentencing court determines whether a prior

153. Because states do not have the equivalent of a generic attempted burglary statute, most courts would have to examine available documents to determine whether the prior offense met all of the elements of generic attempted burglary. However, this method will ensure that the sentencing court is absolutely certain that every attempted burglary employed as a predicate offense for a mandatory minimum fifteen year sentence enhancement actually involved conduct presenting a serious potential risk of injury to another.

154. The Supreme Court explicitly approved of this practice in *Taylor*. *See supra* notes 79-81 and accompanying text. Although *Taylor* explicitly allows courts to look only at charging papers and jury instructions, many courts have ruled that the Supreme Court's decision in *Taylor* does not restrict the court to only those documents. *See infra* note 155 and accompanying text. This Note argues that given the Supreme Court's persuasive arguments against "ad hoc mini-trials," courts must adhere to the categorical approach. However, the nature of attempted burglary makes it such that determining actual physical entry or near entry into a building is not apparent from the mere fact of conviction. Therefore, the prosecution must have a reliable recourse to show that the jury actually had to find these elements to convict.

155. Whether the parties are limited to use of the indictment or information and jury instructions, or whether the Supreme Court merely listed them as examples of permissible proof has also been a source of controversy among lower courts. In fact, when *Taylor* was remanded, the district court allowed the government to introduce "the transcript record of the guilty plea" to show that the defendant's prior burglary offense met the Supreme Court's generic definition. United States v. Taylor, 932 F.2d 703, 706 (8th Cir. 1991). In United States v. Harris, the First Circuit's then Chief Judge Breyer decided that *Taylor* illustrated one way a trial court might decide which of the prior convictions involved offenses constituting violent felonies. 964 F.2d 1234, 1236 (1st Cir. 1992). Judge Breyer noted that another way to make this determination was by reading the presentence report. *Id. See also* United States v. Bregnard, 951 F.2d 457, 458 (1st Cir. 1991) (allowing use of pre-sentence report); United States v. Sweeten, 933 F.2d 765, 769-70 (9th Cir. 1991) (holding that court may use "judicially noticeable facts" clearly establishing that a conviction meets statutory requirements for enhancement purposes); United States v. Hardy, 829 F. Supp. 478, 493 (D. Mass. 1993) (allowing court to use the state probation officer's court notes, the sentence imposed for a prior crime, an order of restitution, and information in an application for complaint); United States v. Hines, 802 F. Supp. 559, 569 (D. Mass. 1992) (holding that court may use other supporting documents such as police records, state pre-sentence reports, and/or official descriptions of the criminal conduct); *but see* United States v. Payton, 918 F.2d 54, 56 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 2143 (1991) (holding that pursuant to *Taylor*, district court erred in looking beyond the statute, charging paper, and jury instructions, to the police report in order to determine whether defendant's prior conviction constituted a violent felony).

offense includes all the elements of generic attempted burglary, it is not limited to "the indictment or information and jury instructions."[156]

Finally, if the prosecution is unable to prove the necessary elements of the predicate offense through appropriate court documents, the rule of lenity[157] prohibits a sentencing court from using the prior attempted burglary conviction to enhance the sentence. It is imperative that courts apply the rule of lenity to ensure that they do not base a mandatory minimum fifteen year sentence enhancement on predicate offenses that do not constitute "violent felonies" under the ACCA.

V. CONCLUSION

After the Supreme Court decided *Taylor v. United States*, the question of whether the crime of attempted burglary is a "violent felony" under the ACCA has become a source of confusion and controversy among federal courts. Some circuits enhance a defendant's sentence where the prior attempted burglaries failed to involve conduct posing a serious risk of physical harm to others, such as casing an intended burglary site. Moreover, some circuits refuse to enhance a defendant's sentence even though the defendant clearly engaged in prior risk-creating attempted burglaries, such as breaking a window to enter a home. Thus, courts are imposing divergent sentences upon defendants committing exactly the same crimes. To rectify this situation, the Supreme Court should adopt a generic attempted burglary definition that encompasses only those elements of attempted burglary that pose a serious potential risk of harm to others. Thus, courts would be able to categorically examine prior attempted burglaries by looking to court records such as charging papers, jury instructions, or trial transcripts and determine whether the prior offense encompassed the requisite elements. In the absence of a uniform treatment of this issue, the ACCA will continue to be an ineffective and unjust federal sentencing statute.

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156. *Taylor*, 495 U.S. at 602.

157. For an explanation of the rule of lenity, see *supra* note 51.