No. 17-1445

In the

Supreme Court of the United States

MICHAEL HERROLD,
CROSS-PETITIONER,

v.

UNITED STATES OF AMERICA,
CROSS-RESPONDENT,

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

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

This Court has repeatedly held that burglary of a vehicle or automobile is non-generic for the purposes of the Armed Career Criminal Act. Under Texas law, a person commits burglary of a "habitation" if the target of the burglary is "a structure *or vehicle* that is adapted for the overnight accommodation of persons." Is this a generic burglary statute?

II

If both of Mr. Herrold's prior burglary convictions are deemed "generic burglaries" and therefore violent felonies under ACCA, then that means that majorities in the Fourth, (en banc) Fifth, (en banc) Sixth, Seventh, Eighth, (en banc) Ninth, and Eleventh Circuits have gotten one or both issues wrong as a matter of law. Did ACCA give Mr. Herrold fair notice that both of his burglary convictions were "violent felonies?"

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Michael Herrold was the defendant in district court, appellant in the Fifth Circuit, and is the cross-petitioner here. The United States was the plaintiff in the district court, the appellee in the Court below, and is the cross-respondent here.

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Cross-Petitioner Michael Herrold asks that in the event the Court grants Cross-Respondent's petition for a writ of certiorari, it also consider two additional questions that were not addressed in that petition.

STATEMENT

It has never been clear—even today—whether Mr. Herrold would ultimately be classified as an Armed Career Criminal. At the time he pleaded guilty, the parties could not say with certainty whether he faced a *maximum* sentence of ten years in prison, or a *minimum* sentence of fifteen years in prison. His written admission of guilt could only set out the parties' respective positions regarding the possible punishment. 5th Cir. R. 78–79. As in so many other cases, Mr. Herrold's fate would be determined by the trial and appellate courts' analysis of decades-old state convictions under the enigmatic Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e) (reprinted at Pet. App. 90a–91a). Even after two sentencing hearings, two panel decisions, a GVR order from this Court, and 55 pages of analysis from the en banc Fifth Circuit, the Government contends there is still more work to be done before finally answering whether or not he is an Armed Career Criminal.

At his initial sentencing hearing, the district court concluded (over Mr. Herrold's objection) that two prior Texas convictions for burglary of a habitation and burglary of a building were violent felonies. Mr. Herrold had argued that burglary of a "habitation" was non-generic because it may have been committed against a "*vehicle* that is adapted for the overnight accommodation of persons," Texas Penal Code § 30.01(1) (emphasis added), and that all Texas burglaries were non-generic to the

extent they did not require proof of a plan to commit some other crime *at the time* the defendant trespassed. In the alternative, he argued that "ACCA fails to provide constitutionally adequate notice that the enhanced penalty would apply under these facts." 5th Cir. R. 303; *see also* 5th Cir. R. 173, 180.[1]

The lower courts repeatedly acknowledged the difficulty and uncertainty associated with the application of ACCA in this case. At the original sentencing hearing, the district court characterized Mr. Herrold's arguments as "forceful" and invited "guidance from the Circuit on these points." 5th Cir. R. 215. At the original oral argument, one Judge mused the dispute over the definition of generic burglary must ultimately be resolved by this Court: "We'll need another opinion from the Supreme Court to know for sure."[2] After the panel affirmed the district court's application of ACCA and 211-month sentence, this Court vacated the sentence and remanded for further consideration in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See Herrold v. United States*, 137 S. Ct. 310 (2016).

On remand, the Fifth Circuit panel again affirmed the sentence, Pet. App. 71a–73a, but the en banc court reversed by a vote of 8–7. Pet. App. 1a–47a. Even after all that litigation, the en banc majority was unable to resolve whether burglary of an automobile adapted for some additional purpose was a generic burglary. Pet. App.

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[1] The Sentencing Transcript and Presentence Related documents were filed under seal in the Fifth Circuit. They are cited here by the 5th Circuit's pagination.

[2] Recording of Jan. 5, 2016 Oral Argument at 37:19, available at:

http://www.ca5.uscourts.gov/OralArgRecordings/14/14-11317_1-5-2016.mp3

37a ("There are powerful arguments on both sides of the question; we think it important to describe them in full in order to explain why we ultimately choose not to decide the question."). Ultimately, the majority re-affirmed its view that Texas Penal Code § 30.02(a)(3)—unprivileged *entry* followed by *commission* of another crime—describes a non-generic burglary, and further recognized that subsections (a)(1) and (a)(3) are alternative means of proving the single, indivisible offense of burglary.

On remand, the district court amended the sentence to time served. *See* Amended Judgment, Doc. No. 85, *United States v. Herrold*, No. 3:13-CR-225-N (N.D. Tex. April 10, 2018). The Government now seeks certiorari, with an ultimate goal of re-instating the original ACCA-enhanced sentence of 211 months.

REASONS TO GRANT THE CONDITIONAL CROSS-PETITION

As explained in his Brief in Opposition, filed this same day, the Court should deny the Government's petition for certiorari. The Fifth Circuit correctly concluded that Texas Penal Code § 30.02(a)(3) is non-generic, and its judgment was correct in any event. But if the Court grants the Government's petition, Mr. Herrold asks that the Court grant this conditional cross-petition to take up two additional issues that could determine the outcome here.

I. IF THE COURT AGREES TO DECIDE THE "CONTEMPORANEOUS INTENT" ISSUE, IT SHOULD CONSIDER THE "ADAPTED VEHICLE" ISSUE AT THE SAME TIME.

A. This Court has repeatedly recognized that generic burglary is committed in a building, not in a motor vehicle.

Burglary of a "motor vehicle" is not a violent felony under ACCA. *Shepard v. United States*, 544 U.S. 13, 15–16 (2005). This rule is derived from *Taylor*'s definition of generic burglary, but *Shepard* made the point most clearly. In *Taylor*, this Court laid out the basic definition of generic burglary: "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 (emphasis added). The Court contrasted this "generic" definition with the Texas burglary statute, which (like California's) expanded burglary to reach crimes against "automobiles." *Id.* at 591.

In 2006, this Court crystallized this principle into an easy-to-apply rule: "The [Armed Career Criminal] Act makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle." *Shepard*, 544 U.S. at 15–16. In that same decision, the Court identified a narrow range of documents courts can consult when deciding whether the Government has proven that a defendant pleaded guilty to a generic burglary. *Id.* at 20–21. If the offense (as defined by those documents) does not match generic burglary, the crime is not a violent felony.

After *Shepard,* the "building"-versus-"vehicle" dichotomy became the textbook illustration of the categorical approach. *See Stitt*, 860 F.3d at 858 ("[T]he Supreme Court has held fast to the distinction between vehicles and movable enclosures versus

buildings and structures in every single post-*Taylor* decision."). Even in cases that weren't about "burglary," this Court has returned to the building-versus-vehicle distinction to illustrate the operation of the categorical approach:

- "[B]reaking into a 'vehicle' . . . falls outside the generic definition of 'burglary,' for a car is not a 'building or structure.'" *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 187 (2007).

- "[T]he behavior underlying, say, breaking into a building differs so significantly from the behavior underlying, say, breaking into a vehicle that for ACCA purposes a sentencing court must treat the two as different crimes." *Chambers* v. *United States*, 555 U.S. 122, 126 (2009)

- "A single Massachusetts statute section . . . criminalizes breaking into a 'building, ship, vessel or vehicle.' In such an instance, we have said, a court must determine whether an offender's prior conviction was for the violent, rather than the nonviolent, break-ins that this single five-word phrase describes (e.g., breaking into a building rather than into a vessel)." *Nijhawan* v. *Holder*, 557 U.S. 29, 35 (2009)

- "One of those alternatives (a building) corresponds to an element in generic burglary, whereas the other (an automobile) does not." *Descamps* v. *United States*, 133 S. Ct. 2276, 2284 (2013)

In the confusing world of prior-conviction analysis, few rules are so clear, and none so clearly established. A straightforward application of this rule to Texas's definition of "habitation" yields a straightforward answer: burglary of a *vehicle* is not a violent felony, and that is true regardless of how that vehicle has been "adapted."

B. Even when a vehicle is "adapted" or "used" for some additional purpose, it remains a "vehicle" for purposes of ACCA.

Despite this rule's repetition and clarity, the Government has argued that the analysis is quite a bit more complicated. Even though this Court has repeatedly, and without exception, held that burglarizing a vehicle is not generic burglary, the

Government has argued here and elsewhere that burglary of *some* vehicles is generic burglary. The exact scope of the Government's proposed exception to the vehicle exclusion—which has never been endorsed by any court applying *Mathis*—is uncertain.

If there were any doubt about whether "adapted" vehicles should be treated like vehicles or like buildings, that doubt should have been eliminated by this Court's decision in *Mathis*. Iowa's burglary statute was similar to Texas's insofar as it defined "occupied structure" to include *some* vehicles. *Id.* at 2250 (discussing Iowa Code § 702.12 (2013)). To count as an "occupied structure" in Iowa, a vehicle must be "adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." Iowa Code § 702.12; s*ee State v. Sanford*, 814 N.W.2d 611, 617 (Iowa 2012) ("Not all land vehicles will qualify for occupied-structure status under the statute.").

Despite Iowa's decision to include only *some* vehicles within its crime of burglary, this Court held (and the Government agreed) that Iowa burglary was non-generic:

> Iowa's burglary statute, all parties agree, covers more conduct than generic burglary does. The generic offense requires unlawful entry into a "building or other structure." Iowa's statute, by contrast, reaches a broader range of places: "any building, structure, *[or] land, water, or air vehicle*."

Mathis, 136 S. Ct. at 2250 (citations omitted). Justices Ginsburg and Breyer, who dissented from *Mathis*'s divisibility holding, agreed with the majority about the scope of the *Shepard* rule:

> The problem arises because, as we have previously held, if the structure that an offender unlawfully entered (with intent to commit a felony) was a "building," the state crime that he committed counts under the federal statute as "burglary." But if the structure that the offender unlawfully entered was a land, water, or air vehicle, the state crime does not count as a "burglary." Thus, a conviction for violating the state statute may, or may not, count as a "burglary," depending upon whether the structure that he entered was, say, a "building" or a "water vehicle."

Mathis, 136 S. Ct. at 2260 (Ginsburg, J., dissenting, and joined by Justice Breyer) (citations omitted).

Mr. Herrold is not the first to argue that Texas's definition of "habitation" is very similar to Iowa's definition of "occupied structure." In October of 2015, the Government filed a brief in this very case arguing that generic burglary should include, in addition to buildings, any "movable structure used for personal occupancy." U.S. Supp. Br. 7 & n.4, *United States v. Herrold*, No. 14-11317 (5th Cir. filed Oct. 28, 2015). The Government's supplemental brief and appendix listed both Texas and Iowa among the states that, in its words, provided "movable structures" with "the same protection as a brick-and-mortar house." *Id.* Later, the Government conceded (and this Court held) that Iowa's so-called "movable structure" burglary was non-generic. *Mathis*, 136 S. Ct. at 2250.

Even so, the Government persisted in arguing here that Texas's burglary of a "habitation" was a generic burglary, even when committed against an adapted automobile. This approach—counting some vehicles as "in" the definition, while

others are "out"—has been rejected by every appellate court to decide the issue since *Mathis*. *See*, e.g., *United States v. Kinney*, 888 F.3d 360, 364 (8th Cir. 2018) ("The government argues against this conclusion by asserting that North Dakota's decision to limit the statute only to vehicles used for living or business purposes brings the statute in line with the generic offense. We disagree."); *United States v. Stitt*, 860 F.3d 854, 859 (6th Cir. 2017) (en banc), *pet. for cert. granted*, No. 17-765, 2018 WL 1901589 (U.S. Apr. 23, 2018) ("Both the government's arguments suffer from the same problem: they ignore the Court's clear and unambiguous language that 'building or other structure' excludes *all* things mobile or transitory."); *United States v. White*, 836 F.3d 437, 446 (4th Cir. 2016) ("Indeed, the statutory definition of the term includes vehicles explicitly. And . . . the fact that the West Virginia definition of 'dwelling house' refers to enclosures used as residences or dwellings 'regularly or . . . from time to time,' W. Va. Code § 61–3–11(c), does not change the result here."); *see also United States v. Franklin*, 884 F.3d 331, 333 (7th Cir. 2018) ("Because the Wisconsin statute extends to several types of vehicles, it is broader than 'generic burglary' under *Taylor* and the ACCA.").

For its part, the Fifth Circuit majority was also suspicious of this argument. Pet. App. 42a ("The weight of federal case law seems to support the conclusion that the federal generic definition of burglary may not extend to any vehicles, even the narrower subset circumscribed by the Texas burglary of a habitation provision."); *but see* Pet. App. 49a (Haynes, J., dissenting).

The *Taylor-Shepard* rule, oft-repeated and easily applied, settles the dispute: burglary committed against a *vehicle* or *automobile* is not generic burglary. *Mathis* went on to provide "a good rule of thumb for reading" Supreme Court decisions: "what they say and what they mean are one and the same." *Mathis*, 136 S. Ct. at 2254. *Shepard*, *Duenas-Alvarez*, *Chambers*, *Nijhawan*, *Descamps*, and *Mathis* all say the same thing: burglary of a *vehicle* is not generic burglary. Burglary of a vehicle—even a vehicle "adapted" for overnight accommodations—is not a generic burglary.

C. If a Texas defendant vandalizes a mothballed motor home, he is guilty of burglary of a "habitation."

One might suppose that Texas prosecutors would utilize the "vehicle" part of the habitation statute only in the most dangerous, risky moments, such as when someone burglarizes an RV being used as a home. But Mr. Herrold demonstrated below that Texas prosecutors utilize this statute to its full, non-generic extent. As one example of the statute's non-generic application, Texas prosecutors charged several defendants with multiple counts of "burglary of a habitation" when they broke into "[s]even motor homes being warehoused at Staton Storage." K. Young, "RVs Vandalized on Tena Street," Jacksonville Daily Progress (Mar. 26, 2008), available at 2008 WLNR 5773562 and reprinted at 5th Cir. R. 307. In other words, the site of the crime was not an RV park, campground, or even a Wal-Mart parking lot. These were mothballed vehicles being "warehoused" at a storage facility. *Id.* Yet the defendants were convicted of multiple counts of burglary of a "habitation" because the vandalized RV's were "adapted" for overnight accommodation. *See* Indictment, Order of Deferred Adjudication, and Judgment Adjudicating Guilt, *State v. Sandoval*, No. 17752-1 (2d

Dist. Ct. Cherokee, Co., Tex. Sept. 24, 2013), *reprinted at* 5th Cir. R. 311–324. Did these vandals commit a "generic" burglary? The Government says yes, but a straightforward application of the *Taylor-Shepard* rule begs to differ.

D. Because Texas does not require that the vehicle actually be *used* like a dwelling, this case can shed light on the question of generic burglary in a way that way that neither *Sims* nor *Stitt* can.

This Court has already granted certiorari in two cases concerning the locational element of generic burglary: *United States v. Stitt*, *pet. for cert. granted*, No. 17-765, 2018 WL 1901589 (April 23, 2018), and *United States v. Sims*, *pet. for cert. granted*, No. 17-766, 2018 WL 1901590 (April 23, 2018). But those cases will not necessarily resolve whether Texas's adapted-vehicle offense is a generic burglary. Both Tennessee and Arkansas require proof that the vehicle be *used* in its non-transportation capacity. *See Stitt*, 860 F.3d at 857 (quoting Tenn. Code Ann. § 39-14-401(a)(A) (A "self-propelled vehicle" is a "habitation" in if it "is designed or adapted for the overnight accommodation of persons and *is actually occupied* at the time of initial entry by the defendant." (emphasis added)); *see also Sims*, 854 F.3d at 1040 (quoting Ark. Code Ann. § 5-39-101(4)(A)) ("Arkansas's statute confines residential burglary to vehicles '[i]n which any person lives' or '[t]hat [are] customarily used for overnight accommodation.'").

Unlike these states, Texas only requires that the vehicle be *adapted* for overnight accommodation. *See* Texas Penal Code § 30.01(1). Even if the vehicle is parked in a storage facility where no person is even permitted to occupy it, the vehicle is a "habitation" and vandalizing it counts as a "burglary."

II. IF THE COURT GRANTS CERTIORARI, IT SHOULD CONSIDER WHETHER THE *CONFLUENCE* OF THESE TWO SEPARATE BUT PERPLEXING LEGAL ISSUES IS CONSISTENT WITH THE PRINCIPLE OF FAIR NOTICE.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court held that ACCA's dramatic sentence-enhancement must "give ordinary people fair notice of the conduct it punishes." *Id.* at 2556. The Court struck down ACCA's residual clause because it did not satisfy these constitutional demands: "We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557.

If the Government has its way here—that is, if Mr. Herrold's original ACCA sentence is reinstated—then it will mean that majority-rules votes by life-tenured federal appellate judges in the Fourth,[3] (en banc) Fifth,[4] (en banc) Sixth,[5] Seventh,[6]

[3] *White*, 836 F.3d at 446 (Motor homes are not buildings or structures.)

[4] Pet. App. 1a–47a (Entry followed by another crime is not entry-with-intent.)

[5] *Stitt*, 860 F.3d at 859–860 (Motor homes are not buildings or structures.)

[6] *Franklin*, 884 F.3d at 333–334 (Wisconsin burglary is not generic burglary because it reaches "several types of vehicles."); *see also Van Cannon v. United States*, __ F.3d __, No. 17-2631, 2018 WL 2228251, at *6 (7th Cir. May 16, 2018) ("On those facts the entry would be unprivileged but not accompanied by burglarious intent—that is, the perpetrator did not commit an unprivileged entry with the present intent to commit a crime in the building.").

Eighth,[7] (en banc) Ninth,[8] and Eleventh[9] Circuits somehow *all* missed the mark on one or both of the issues he raised concerning the definition of "generic burglary." It seems odd to suggest that all these federal appellate judges could be wrong on one or both issues, and yet Mr. Herrold had "fair notice" that his conduct was subject to ACCA's 15-year minimum, and its life-long maximum, rather than the default 10-year maximum of 18 U.S.C. § 924(a)(2).[10]

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[7] *Kinney*, 888 F.3d at 364 ("By including both structures and vehicles within its reach, the statute criminalizes more conduct than the generic version of the offense."); *accord United States v. Sims*, 854 F.3d 1037, 1040 (8th Cir. 2017), *pet. for cert. granted*, No. 17-766; *United States v. Lamb*, 847 F.3d 928, 931 (8th Cir. 2017). *See also United States v. McArthur*, 850 F.3d 925, 940 (8th Cir. 2017) ("Because a conviction under" Minnesota third-degree burglary "does not require that the defendant have formed the 'intent to commit a crime' at the time of the nonconsensual entry or remaining in, it does not satisfy the generic definition of burglary.").

[8] *United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007) (en banc) ("'[B]uilding or structure' does not encompass "other places, such as all or some types of vehicles," including motor homes, and objects such as telephone booths."); *accord United States v. Cisneros*, 826 F.3d 1190, 1194 (9th Cir. 2016) (Burglarizing a vehicle that is "regularly or intermittently is occupied by a person lodging therein at night" is not generic burglary.).

[9] *United States v. Gundy*, 842 F.3d 1156, 1164–1165 (11th Cir. 2016) (Georgia burglary against a "vehicle . . . designed for use as the dwelling house of another" is non-generic).

[10] Mr. Herrold argued, at the original sentencing proceeding, that ACCA did not "provide constitutionally adequate notice that the enhanced penalty would apply under these facts." 5th Cir. R. 303. In his most recent brief to the Fifth Circuit, he likewise argued that the "doctrine of fair notice . . . counsels caution before applying a new, retroactive interpretation to terms with settled meanings." Supp. En Banc Brief 7, *United States v. Herrold*, No. 14-11317 (5th Cir. filed Aug. 9, 2017). At the en banc oral argument he continued to urge the Court that it could not retroactively apply significant changes in the law to his 2012 possession of a firearm.

The 1984 definition of burglary provided two clear rules, either of which would be sufficient to resolve this case: (1) the target of a generic burglary must be a "building," and (2) the trespass (whether entering or surreptitiously remaining) must be accompanied by a specific intent to commit another crime. *See* BIO App. 2b. If this Court were to discard the 1984 definition of burglary, then it is very difficult to predict how this case might ultimately be decided. Trying to forecast the ultimate outcome calls to mind Justice Scalia's colorful description of residual-clause jurisprudence in *Derby v. United States*:

> How we would resolve these cases if we granted certiorari would be a fine subject for a law-office betting pool. No one knows for sure.

131 S. Ct. 2858, 2859 (2011) (mem.) (Scalia, J., dissenting from denial of certiorari). Of course, the specter of vagueness and uncertainty for ACCA's enumerated offense of "burglary" could be avoided by sticking to the 1984 statutory definition, as interpreted by *Shepard* and *Taylor*. But if (as the Government requests) the Court will now alter those settled pronouncements, then the question of whether Mr. Herrold is an Armed Career Criminal *remains* unsettled, many years after his crime was completed.

One of Mr. Herrold's burglaries could be committed by vandalizing an unused, warehoused automobile (albeit one *adapted for the overnight accommodation of persons*). *See* Texas Penal Code § 30.01(1). The other could be committed by wandering into an open house "to escape the cold," Pet. App. 22a, then committing a reckless or even negligent felony offense after that entry. *See* Texas Penal Code § 30.02(a)(3). Neither of those crimes would have counted as an ACCA "burglary" in

1984, and neither satisfies the definition of "burglary" propounded in *Taylor* and clarified in *Shepard*. Yet the Government contends that the definition must have changed *in two ways* at some unknown point in the interim (or perhaps that the definition *will* change after this Court decides *Stitt*, *Sims*, this case, and perhaps *Quarles v. United States*, No. 17-778). If the Court is going to re-visit the definition of generic burglary, Mr. Herrold asks that it also consider whether the retroactive application of that new definition more than six years after he committed the federal offense is consistent with the constitutional requirement of fair notice.

CONCLUSION

As explained in the Brief in Opposition, the Government's petition should be denied. But if the Court grants the Government's petition, Mr. Herrold asks that the Court also grant this cross-petition.

Respectfully submitted,

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