No. __-____

IN THE

Supreme Court of the United States

MALCOLM OMAR ROBINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether North Carolina Breaking and Entering, which criminalizes, among other things, the breaking or entering into "any other structure designed to house or secure within it any activity or property," is broader than Armed Career Criminal Act burglary.

II. Whether the Fourth Circuit's judgment should be vacated and this case remanded for further review in light of this Court's recent opinion in *Rehaif v. United States,* No. 17-6560 (June 21, 2019).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statutes

Other Authorities

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Petitioner Malcolm Omar Robinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's Opinion affirming Mr. Robinson's conviction and sentence is attached at Pet. App. 1a and is reported at 714 Fed. Appx. 275 (4th Cir. 2018). The Fourth Circuit Order denying a timely petition for rehearing and rehearing en banc is attached at Pet. App. 4a.

LIST OF PRIOR PROCEEDINGS

1. *United States v. Malcolm Omar Robinson*, No. 7:16-cr-00045-BR-1, United States District Court for the Eastern District of North Carolina.

   Final judgment entered on February 8, 2017.

2. *United States v. Malcom Omar Robinson,* No. 17-4076, United States Court of Appeals for the Fourth Circuit.

Opinion issued on March 12, 2018.

Petition for rehearing en banc denied on February 11, 2019.

JURISDICTION

The Fourth Circuit issued its opinion on March 12, 2018. Pet. App. 1a. The Fourth Circuit denied Mr. Robinson's timely petition for rehearing and rehearing en banc on February 11, 2019. Pet. App. 4a. On April 23, 2019, The Chief Justice granted Mr. Robinson's application for an extension of time to file this petition and extended the time until July 11, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

N.C. Gen. Stat. § 14-54:

> (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.
>
> . . .
>
> (c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

18 U.S.C. § 922(g)(1):

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

> ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)(2)(B)(ii):

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . .that is burglary, arson, [] extortion, [or] involves use of explosives.

STATEMENT OF THE CASE

Mr. Malcom Robinson has a 73 IQ. He dropped out of high school after the 9th grade. He later tried to get his GED, but he was not successful. Before the proceedings related to the charges underlying this petition, he had appeared in court only once regarding criminal behavior. In September 2013, the Robeson County (NC) Superior Court accepted his guilty plea to multiple charges resulting from conduct he committed when he was 16 years old: Possession of a Stolen Motor Vehicle; three counts of Breaking and Entering; three counts of Larceny; and Conspiracy to Commit Breaking and Entering.

The Superior Court consolidated these counts for sentencing and sentenced him on the same day to 6 to 17 months of custody, fully suspended, and three years of probation with a special condition of 100 days in custody. Later, the court revoked his probation and he served approximately 9 months of the sentence. He also later served 7 months custody on a revocation of post-release supervision.

He avoided further criminal charges until February 2016, when Lumberton (NC) police officers responded to a traffic accident. They discovered Mr. Robinson getting out of a car with a gun. They also found marijuana in the car. Mr.

Robinson admitted to knowingly possessing the gun and the drugs. A grand jury sitting in the Eastern District of North Carolina indicted him on one count of possession of a quantity of marijuana in violation of 21 U.S.C. § 841(a)(1) and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

Mr. Robinson was a man with a 73 IQ whose only prior convictions happened before he was 18 and who never served over a year on those convictions. But at the time the grand jury indicted Mr. Robinson, the controlling law held that the United States did not need to prove that Mr. Robinson knew that he had a prior felony in order to convict him of being a felon in possession of a firearm. Thus, even though Mr. Robinson could have credibly and convincingly argued to a jury that he did not know he had a prior felony conviction, he pleaded guilty to both counts.

In preparation for sentencing, the United States Probation Office prepared a presentence report that classified Mr. Robinson as an Armed Career Criminal based on the three North Carolina Breaking or Entering convictions from when he was sixteen years old. This classification changed his sentencing exposure from 0-10 years to 15 years to life.

Mr. Robinson objected, arguing that the North Carolina Breaking and Entering convictions on which the Probation Office relied were not categorically "violent felonies" as required by the Armed Career Criminal Act ("ACCA") because they were categorically broader than ACCA burglary. The district court, feeling constrained by the Fourth Circuit, overruled the objection and sentenced Mr. Robinson to the mandatory minimum 180-month sentence. But it was not happy:

> I think it's outrageous for me to have to sentence this young man to a minimum of 180 months in prison, which is 15 years, which is the statutory minimum. But I have no choice.
>
> The only comfort I have is that the case that is now pending in the Fourth Circuit, if it provides relief, it will be back before me for additional relief.

Mr. Robinson timely appealed, raising the sole argument that North Carolina Breaking or Entering is not an ACCA predicate because it criminalizes the breaking or entering of vehicles, making it broader than ACCA "burglary." A panel of the Fourth Circuit issued an unpublished per curiam decision disagreeing and holding "that North Carolina breaking or entering's 'building' element sweeps no more broadly than generic burglary's 'building' element." The Fourth Circuit then denied rehearing and this petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant review because this case presents two important questions of federal law that this Court should decide. Sup. Ct. R 10(c).

I. WHETHER NORTH CAROLINA BREAKING AND ENTERING, WHICH CRIMINALIZES, AMONG OTHER THINGS, THE BREAKING OR ENTERING INTO "ANY OTHER STRUCTURE DESIGNED TO HOUSE OR SECURE WITHIN IT ANY ACTIVITY OR PROPERTY," IS BROADER THAN ARMED CAREER CRIMINAL ACT BURGLARY.

ACCA defines an Armed Career Criminal in relevant part as "a person who . . . has three previous convictions . . . for a violent felony." 18 U.S.C. § 924(e)(1). It defines a violent felony as

> any crime punishable by imprisonment for a term exceeding one year . . .that–

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

Id. § 924(e)(2)(B).[1]

Because all of the predicate convictions on which the district court relied to sentence Mr. Robinson as an Armed Career Criminal are violations of North Carolina Breaking or Entering, this petition presents the narrow question of whether that crime constitutes a violent felony.

In determining whether a crime is a violent felony, courts must apply a categorical approach, "consider[ing] the offense generically . . . examin[ing] it in terms of how the law defines the offense, and not in terms of how an individual defender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008). When using this approach to determine whether a prior offense qualifies as one of the offenses enumerated in the violent crime definition, the court "focus[es] solely on whether the elements of the crime of conviction sufficiently match the elements of [the listed] generic [crime], while ignoring the particular facts of the case." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *accord Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). The prior conviction may operate as a predicate if it is defined more narrowly than, or

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[1] The portion of the definition that reads "otherwise involves conduct that presents a serious potential risk of physical injury to another," is not applicable because it is unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015).

has the same elements as, the generic federal crime. *Descamps* 133 S. Ct. at 2283. If, however, the prior offense "sweeps more broadly than the generic crime," *id.*, then the prior offense cannot serve as a statutory predicate.

North Carolina Breaking or Entering is not arson or extortion and does not involve the use of explosives. Thus, it is a violent felony if and only if the elements match the elements of generic burglary. They do not because North Carolina criminalizes the breaking and entering into enclosures that are not ACCA "buildings."

A. The question of what type of enclosures are ACCA "buildings" is currently unsettled after *United States v. Stitt*.

ACCA burglary is the "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. 575, 598 (1990); *accord Mathis*, 136 S. Ct. at 2248. Generic burglary's 'building or other structure' element does not, however, encompass every enclosure. Generic burglary does not include, for example, burglary of a boat or motor vehicle, *Shepard v. United States*, 544 U.S. 13, 15-16 (2005), or a "land, water or air vehicle." *Mathis*, 136 S. Ct. at 2250. Nor does generic burglary encompass the breaking or entering of "any booth or tent, or any boat or vessel, or railroad car." *Taylor*, 495 U.S. at 599.

This Court recently began to clarify this meaning in *United States v. Stitt*, holding that burglary includes the breaking into "a structure or vehicle that has been adapted or is customarily used for overnight accommodation." 139 S. Ct. 399, 403 (2018). In so holding, this Court reaffirmed its prior precedents and indicated that each state's statute must be evaluated on its own merits. This Court reiterated

its holding in *Taylor* that Missouri breaking and entering falls outside the Act because it includes breaking and entering into "any boat or vessel or railroad car" and thus includes "ordinary boats and vessels often at sea and railroad cars often filled with cargo, not people." *Id.* at 407. It also relied on its holding in *Mathis* that an Iowa statute including breaking into vehicles or similar structures used "for the storage or safekeeping of anything of value" was broader than generic burglary. *Id.*

But this Court also indicated that *Stitt* still left important questions unresolved. It vacated and remanded the sentence of one of the defendants in the *Stitt* case, Mr. Jason Sims, to explore his argument that Arkansas residential burglary is overbroad because it covers burglary of a vehicle where a homeless person occasionally sleeps. *Id.* at 407-408.[2]

B. North Carolina Breaking or Entering includes enclosures that this Court has yet to address in the ACCA burglary context.

This petition presents this Court with the opportunity to resolve one of the questions remaining after *Stitt*: Whether "any other structure designed to house or secure within it any activity or property" is a building for ACCA burglary purposes. In North Carolina, someone commits the offense of breaking or entering when he "breaks or enters any building with intent to commit any felony or larceny therein." N.C. Gen. Stat. § 14-54(a). The term "building" includes "any dwelling, dwelling house, uninhabited house, building under construction, building within the

[2] As of this writing, the Eighth Circuit has yet to rule on Mr. Sims's case on remand. *See United States v. Sims*, Eighth Circuit Doc. No. 16-1233 (last visited July 8, 2019).

curtilage of a dwelling house, and *any other structure designed to house or secure within it any activity or property.*" N.C. Gen. Stat. § 14-54(c) (emphasis added).

North Carolina courts have applied this language to extend the Section 14-54(a) definition of building to include vehicles. The North Carolina courts hold that an unoccupied mobile home intended for retail sale and not affixed to the premises of the dealership qualifies as a "building" for purposes of the breaking or entering statute. *State v. Douglas*, 277 S.E.2d 467 (N.C. Ct. App. 1981). Similarly, an occupied "travel trailer" temporarily parked on a farm "satisf[ied] the occupied dwelling element of first degree burglary." *State v. Taylor*, 428 S.E.2d 273, 274 (N.C. Ct. App. 1993).

Travel trailers and mobile homes are not ACCA buildings; they are vehicles. Even North Carolina law agrees with that. *See, e.g.*, N.C. Gen. Stat. § 20-4.01(23) (defining "motor vehicle" as "[e]very vehicle . . . designed to run upon the highways which is pulled by a self-propelled vehicle"); N.C. Gen. Stat. § 20-4.01(32b) (defining "travel trailer" as a "recreational vehicle"); *King Homes, Inc. v. Bryson*, 159 S.E.2d 329, 332 (N.C. 1968) ("A mobile home is classified by statute as a motor vehicle."); *In re Meade*, 174 B.R. 49, 51 (Bankr. M.D.N.C. 1994) ("It is clear under North Carolina law that a mobile home is [a] 'motor vehicle' for purposes of the statutes dealing with registration and ownership of motor vehicles."). As the Supreme Court of North Carolina has explained, "[a] mobile home is designed to be operated upon the highways; and an owner who intends to so operate it is required to make application to the Department of Motor Vehicles for, and obtain, the registration

thereof and issuance of a certificate of title for such vehicle." *King Homes*, 159 S.E.2d at 332. *Accord Briggs v. Rankin*, 491 S.E.2d 234, 238 (N.C. Ct. App. 1997) (noting that the "title to a 'mobile home' or 'trailer' passes by transfer of a manufacturer's certificate of origin and carries with it a normal motor vehicle title obtained from the N.C. Department of Motor Vehicles").

Because the North Carolina courts interpret the breaking or entering statute to include the unlawful entry of vehicles such as travel trailers and mobile homes, this petition presents this Court with the opportunity to refine the meaning of "building" for ACCA purposes. This Court should take this opportunity to provide needed guidance to lower courts.

II. WHETHER THE FOURTH CIRCUIT'S JUDGMENT SHOULD BE VACATED AND THIS CASE REMANDED FOR FURTHER REVIEW IN LIGHT OF THIS COURT'S RECENT OPINION IN *REHAIF V. UNITED STATES*, NO. 17-6560 (JUNE 21, 2019).

The United States charged Mr. Robinson with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which says that

> It shall be unlawful for any person—
>
> who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.
>
> 18 U.S.C. §922(g)(1).

At the time of Mr. Robinson's guilty plea, sentencing, and appeal to the 4th Circuit, the controlling law held that the United States did not need to prove that

Mr. Robinson knew he "been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" in order to convict him of being a felon in possession of a firearm. That controlling law was wrong, as this Court held on June 21st of this year. *See Rehaif v. United States*, No. 17-6560, 2019 WL 2552487, 2019 U.S. LEXIS 4199. Had the parties and the district court known the proper interpretation of the law, Mr. Robinson would likely not have pleaded guilty but would have forced the government to prove his knowledge at trial. As noted above, (1) Mr. Robinson has a 73 IQ; (2) his only convictions were for activity that occurred when he was sixteen; (3) and he served less than a year in jail for his prior criminal conduct. The government would have had a difficult time proving that he knew that his prior convictions were "felonies." Mr. Robinson thus asks this Court to vacate the Fourth Circuit opinion and remand this case to allow the parties to address in the Fourth Circuit whether the plea agreement in this case was unknowing and unintelligent in light of *Rehaif*.

Rehaif explains that "in prosecutions under § 922(g) and § 924(a)(2), the Government must prove that a defendant knows of his status as a person barred from possessing a firearm," 2019 WL 2552487 at *3. This Court has confirmed that a plea is constitutionally invalid and a defendant has not intelligently entered a guilty plea if "neither he, nor his counsel, nor the court correctly understood the essential elements of the crime, as those elements were interpreted by this Supreme Court after entry of the plea." *Bousley v. United States*, 523 U.S. 614, 618-619

(1998). In such a case, the appellate court may review for plain error when the defendant failed to challenge the adequacy of his guilty plea in the district court.

The proper course here is to allow the Fourth Circuit the opportunity for this review and to allow the parties to make whatever arguments are appropriate in that court in light of *Rehaif*. *See Rehaif*, 2019 WL 2552487, at *7 (reversing the judgment of the Court of Appeals and remanding the case for further proceedings); *Id.* at *17 (Alito, J., dissenting) ("Those for whom direct review has not ended will likely be entitled to a new trial.").

CONCLUSION

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

Respectfully submitted,

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