No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

ALEXANDER FAULKNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Generic burglary must be committed in a *building or structure*. For non-buildings like vehicles to qualify as a *structure*, this Court has required that the structure be adapted or customarily used for overnight accommodation. Indiana burglary covers breaking into an outdoor, fenced-in area that does not enclose or adjoin a building and that is not adapted or customarily used for either overnight accommodation or for conducting business inside it. Does an Indiana burglary conviction qualify as generic burglary?

LIST OF PARTIES

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 926 F.3d 475 (8th Cir. 2019), and is reprinted in the appendix hereto (Appendix A).

The judgment of the United States District Court for the District of Minnesota (Ericksen, J.) is available electronically at 2018 WL 138126. A copy of this electronic citation is reprinted in the appendix hereto (Appendix B).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit denied Petitioner's motion for rehearing and rehearing en banc in the unpublished opinion issued September 26, 2019. The jurisdiction of this Court to review the judgement of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This Petition involves provisions of the United States Code and statutes of the State of Indiana, particularly—

* * *

18 U.S.C. § 922(g)

Unlawful acts

(g) It shall be unlawful for any person—

(1) 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)

Penalties

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951

et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years of more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * *

Indiana Statute § 35-43-2-1 (1982)

Burglary

A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon or if the building or structure is a dwelling, and a Class A felony if it results in either bodily injury or serious bodily injury to any person other than a defendant.

* * *

INTRODUCTION

Imagine a four-sided, open-air fence that (1) does not enclose or adjoin a building and (2) that is not adapted or customarily used for overnight accommodation or conducting business inside it. The question in this case is simple: does breaking into such a fence constitute generic burglary?

For example, say an owner of an auto mechanic store erects a four-sided, open-air fence that encloses only some asphalt. (Picture a fenced-in tennis court without the net posts, net, or painted lines.) The fence does not enclose or adjoin his store. The fenced-in area is used to store customer cars until the mechanics are ready to bring them inside the shop and work on them. The state burglary statue provides that if a defendant breaks into that fence, then he or she will have committed burglary. Does a burglary conviction under such a statute qualify as generic burglary for purposes of the Armed Career Criminal Act (ACCA)? Put another way, does such a fence constitute a *structure* for purposes of generic burglary?

The ACCA mandates a prison sentence of 15 years to life for a defendant convicted under 18 U.S.C. § 922(g)(1) when he has three or more prior convictions for a violent felony or serious drug offense (often times referred to as predicate convictions or ACCA predicates). 18 U.S.C. § 924(e)(1). To qualify as an ACCA predicate, Petitioner's Indiana burglary conviction would need to fall within the enumerated-offense clause of 18 U.S.C. § 924(e)(2)(B)(ii), which turns on whether Indiana burglary qualifies as generic burglary.

To qualify for an ACCA enhancement under generic burglary, the elements of the Petitioner's Indiana state burglary conviction must be the same or narrower than

the elements of generic burglary. Generic burglary is an "unlawful or unprivileged entry into, or remaining in, a *building or structure*, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990) (emphasis added). Supreme Court precedent and reasoning shows that the locational phrase *building or structure* means (1) a building or (2) a structure that is not adapted or customarily used for the overnight accommodation of persons or for carrying on business inside it. The driving principle behind (2) is to include structures that have the apparent potential for regular occupancy or business.

Indiana state law, however, has defined the same locational phrase—*building or structure*[1]—more broadly to include an open-air, four-sided fence that does not enclose or adjoin a building, even when the fenced-in area has not been adapted for and is not customarily used for overnight accommodation or conducting business inside it, and thus does not have the apparent potential for regular occupancy. *Gray v. State*, 797 N.E.2d 333, 335-36 (Ind. Ct. App. 2003). In *Gray*, the owner of an auto repair shop had an outdoor, fenced-in area where he would store customer's cars that had been left for repair. *Id.* at 334-335. The fence was six-feet high, and the fenced-in area did not adjoin his auto repair shop, nor did it enclose it. *Id.* Moreover, the auto

[1] When Faulkner was convicted, Indiana defined burglary thus: "A person who breaks and enters the building or *structure* of another person, with intent to commit a felony in it, commits burglary, a Class C felony." Ind. Code § 35-43-2-1 (1982) (emphasis added). The precise elements of this offense, unsurprisingly, are what Indiana courts say they are: that is, state courts control what state law means. *Curtis Johnson v. United States*, 559 U.S. 133, 138 (2010). So the fact that Indiana burglary statute's language is "nearly identical to that of 'generic burglary'" is not controlling. *Faulkner v. United States*, 926 F.3d 475, 478 (8th Cir. 2019) (internal quotation marks omitted). What governs is how Indiana courts have interpreted that language. Since they have interpreted it more broadly than generic burglary, convictions under the Indiana burglary statute do not qualify as violent felonies under the ACCA.

repair shop did not repair cars in the fenced-in area; this was simply where customer's cars that were left at the shop for repair would be stored until they could be taken into the shop and worked on. *Id.* *Gray* held that this outdoor, fenced-in area constituted a *structure* within the meaning of the burglary statute, and that breaking into it thus qualified as Indiana burglary. *Id.* at 335-36. (For ease of reference, Faulkner refers to the type of fence found to qualify as a *structure* in *Gray* as a *"Gray* fence".)

A *Gray* fence is not adapted for the overnight accommodation of persons or for conducting business inside it. It lacks the apparent potential for regular occupancy. *Gray* fences therefore do not qualify as a building or a *structure* for purposes of generic burglary. The Eighth Circuit's contrary conclusion conflicts with the teaching and principles of *Stitt*, *Shephard*, and *Taylor*.

The practice of states interpreting the term *structure* or a similar locational term as encompassing *Gray* fences is not limited to Indiana. The government contends that Indiana's definition of *structure* is consistent with how most states define the term, and it included a 50-state survey along with its appellee brief as proof. (Appellee Br. at 17, *Faulkner v. United States*, No. 18-1984 (July 27, 2018); Addendum of Appellee, *Faulkner v. United States*, No. 18-1984 (July 27, 2018).) Because the government bears the burden of proving ACCA predicates, *United States v. Amos*, 501 F.3d 524, 526 (6th Cir. 2007), the government's belief (1) that *Gray* fences qualify as structures for purposes of generic burglary and (2) that most states define *structure* as including *Gray* fences shows that this issue will continue to recur. But as explained above summarily and below in more detail, a *Gray* fence is broader

than the term *structure* in generic burglary. To allow the Eighth Circuit's erroneous ruling in *Faulkner* to stand uncorrected allows lower courts to disregard this Court's teaching that *structure* for generic-burglary purposes is limited to structures that either have been adapted for or are customarily used for overnight accommodation or conducting business inside them.

Review of this unsettled issue is imperative because (i) the lower court's ruling conflicts with this Court's principles and reasoning in prior decisions; (ii) the lower court's ruling frustrates Congress's purpose of the Armed Career Criminal Act; and (iii) this issue will continue to recur in other criminal cases and cause defendant's sentences to be unlawfully enhanced from (a) 0-10 years to (b) 15 years to life in prison. This Court should therefore clarify that state statutes that reach *Gray* fences do not qualify as ACCA predicates, particularly given this Court's prior delineation of *structure* in *Taylor v. United States*, 495 U.S. 575 (1990), *Shepard v. United States*, 544 U.S. 13 (2005), and *United States v. Stitt*, 139 S. Ct. 399 (2018). This case is an excellent vehicle for making this clarification.

STATEMENT OF THE CASE

In 2015, Petitioner was convicted on two counts of being a felon in possession of firearms and ammunition, thereby violating 18 U.S.C. § 922(g)(1). At sentencing, the Court determined that Petitioner's sentence should be enhanced under the ACCA because he had four qualifying ACCA predicates. Petitioner appealed to the Eighth Circuit Court of Appeals. The government conceded that one of Petitioner's predicates was no longer viable in light of *Samuel Johnson v. United States*, 135 S. Ct. 2251 (2015). The court nonetheless found that Petitioner still had three valid ACCA

predicates, one of which was the Indiana burglary conviction, and affirmed his sentence in June 2016.

Petitioner filed a 28 U.S.C. § 2255 motion to vacate his sentence in June 2017. He argued that his Indiana burglary conviction did not qualify as generic burglary because Indiana's burglary statute is broader than generic burglary. Specifically, Petitioner argued that Indiana's definition of *structure* has been interpreted to include *Gray* fences—i.e., fenced-in areas that (a) do not enclose or adjoin a building or (b) are not adapted or customarily used for overnight accommodation or for conducting business inside them—and that *Gray* fences do not constitute a *structure* for purposes of generic burglary. So the term *structure* in Indiana burglary was broader than the same term in generic burglary, and the state conviction could not count as a predicate offense.

The district court rejected Petitioner's location-based argument, relying on a Seventh Circuit case, *United States v. Perry*, 862 F.3d 620, 622 (7th Cir. 2017), which had held that Indiana burglary fit within generic burglary. Because the district court relied on *Perry* when it rejected Petitioner's location-based argument and because *Perry* was not binding precedent, the district court issued Petitioner a certificate of appealability on whether his Indiana burglary conviction qualified as an ACCA predicate. (App. A).

Petitioner appealed to the Eighth Circuit Court of Appeals, challenging the district court's ruling. Petitioner argued his sentence was improperly enhanced under the ACCA because his conviction for Indiana burglary was broader than generic burglary and thus was not a predicate offense. Petitioner also argued that the Eighth

Circuit ruling conflicted with Supreme Court precedent and undermined the legislative intent for the Armed Career Criminal Act, 18 U.S.C. § 924(e). (App. B)

The Court of Appeals rejected Petitioner's appeal and his following petition for rehearing en banc. As explained below, Petitioner now requests that this Court review whether a state burglary statute that encompasses breaking into a *Gray* fence qualifies as a conviction for generic burglary under the ACCA sentencing enhancement.

REASON FOR GRANTING THE WRIT

In order for a state burglary conviction to qualify as a predicate offense under the ACCA sentencing enhancement, the state elements must be the same or narrower than generic burglary. Since Indiana's definition of *structure* is broader than generic burglary's and defies Supreme Court precedent, the erroneous Eighth Circuit ruling must be corrected.

The issue in this case—whether a state burglary statute that encompasses breaking into a *Gray* fence qualifies as a predicate offense under the Armed Career Criminal Act—is exceptionally important. First, the lower court's ruling conflicts with this Court's principles and reasoning in *Taylor v. United States*, 495 U.S. 575 (1990), *Shepard v. United States*, 544 U.S. 13 (2005), and *United States v. Stitt*, 139 S. Ct. 399 (2018). Second, the Eighth Circuit's ruling frustrates the ACCA's purpose; and third, this issue will continue to result in sentences of at least 15 years being unlawfully imposed because, as the government itself contended in its appellee brief, most other states define *structure* consistently with Indiana as including *Gray* fences.

Generic burglary is an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). When Petitioner was convicted, Indiana defined burglary thus: "A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C felony." Ind. Code § 35-43-2-1 (1982).

From the discussion of *Gray* above, we know that Indiana burglary reaches outdoor, fenced-in areas enclosing property (such as cars stored outside until they can be worked on in an auto-repair shop), even when the fence does not enclose or adjoin

a building, and even when the fence is not adapted or customarily used for overnight accommodation or for conducting business inside it. *Gray*, 797 N.E.2d at 335-36. Since it is obvious that a *Gray* fence is not a building—it doesn't even have a roof—we have to determine whether the term *structure* in generic burglary includes a *Gray* fence.

Taylor and *Stitt* show that *structure* in generic burglary does not include such a fence.

Taylor came up with the definition of generic burglary by looking at the ACCA's history and purpose. *Taylor* explicitly flagged the importance of purpose in sussing out the meaning of generic burglary: "[t]hese observations about the purpose and general approach of the enhancement provision enable us to narrow the range of possible meanings of the term 'burglary.'" *Taylor*, 495 U.S. at 590. The ACCA's purpose: "to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof." *Id.*

Taylor reasoned that Congress concluded that burglary—a crime that doesn't necessarily involve violence—was such an offense because it was "inherently dangerous." *Stitt*, 139 S. Ct. at 406. The legislative history "indicates that *Congress singled out burglary* (*as opposed to* other frequently committed property crimes such as larceny and *auto theft*) for inclusion as a predicate offense, both in 1984 and in 1986, *because of its inherent potential for harm to persons*. The fact that an offender *enters a building* to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate. And 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." *Taylor*, 495 U.S. at 588 (emphasis added).

This language shows why a building was included, and *Stitt* shows that this "inherently dangerous" rationale also explains that other structures besides buildings will be included provided that breaking into that structure "is likely to present a serious risk of violence." *Stitt*, 139 S. Ct. at 399. In *Stitt*, the Supreme Court "held [that] state statutes prohibiting burglary of *vehicles* customarily used or adapted for 'overnight accommodation of persons' are no broader than the generic offense." *Faulkner*, 926 F.3d at 479 (quoting *Stitt*, 139 S. Ct. at 404). The limitation that the vehicle "has been adapted or is customarily used for overnight accommodation," *Stitt*, 139 S. Ct. at 403-04, ensures that an "offender who breaks into" such a vehicle "runs a similar or greater risk of violent confrontation" as does an offender who breaks into a building, *id.* at 406. *Stitt* rejected the argument that the risk of violence is decreased if the vehicle is used for lodging only part of the time because it found "no reason to believe that Congress intended to make a part-time/full-time distinction. After all, a burglary is no less a burglary because it took place at a summer home during the winter . . . ." *Id.* The point is that burglary "should cover places with the 'apparent potential for regular occupancy.'" *Id.* (quoting Model Penal Code § 221.1, Comment 3(b), p. 72.)

Stitt also rejected the defendant's appeals to portions of *Taylor* showing that generic burglary did not cover non-typical structures such as "breaking and entering '*any* boat or vessel, or railroad car.'" *Id.* at 407 (quoting *Taylor*, 495 U.S. at 599) (emphasis in original). *Stitt*'s reasons for rejecting this argument are crucial for

understanding why a *Gray* fence does not qualify. Those statutes were broader because they used the word *any*, thereby "refer[ing] to ordinary boats and vessels often at sea (and railroad cars often filled with cargo, not people) nowhere restricting [their] coverage, as here, to vehicles or structures customarily used or adapted for overnight accommodation. The statutes before us, by using these latter words, more clearly focus upon circumstances where burglary is likely to present a serious risk of violence." *Id.*

Because a *Gray* fence is not customarily used or adapted for overnight accommodation, breaking into such a structure is not likely to present a serious risk of violence. A would-be burglar would correctly conclude that a *Gray* fence does not have the "apparent potential for regular occupancy." Model Penal Code § 221.1, Comment 3(b), p. 72.[2] *Stitt* highlighted that railroad cars were excluded from generic burglary because they were "often filled with cargo, not people." *Stitt*, 139 S. Ct. at 407. A *Gray* fence is even less likely to contain people. Some railroad cars are passenger cars that exist to transport people.[3] But the *Gray* fence was specifically

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[2] Similarly, a *Gray* fence is not "adapted 'for carrying on business therein.'" *Faulkner*, 926 F.3d at 479 (quoting Model Penal Code § 221.0(1).) This is a fence where cars waiting to be worked on were stored. The cars were not worked on inside the fence and business with the customer was obviously conducted inside the store, where the register would be located. So the Eighth Circuit's decision pointing to this language from the Model Penal Code does not change the analysis.

[3] Typing the phrase "definition car" in google yields the following as a second definition in the dictionary that appears at the top above the first hyperlink: "a railroad vehicle for passengers or freight." *See* https://www.google.com/search?source=hp&ei=LC15XZekI5C6-gSM8a3ACA&q=definition+car&oq=definition+car&gs_l=psy-ab.3..0l10.1879.4790..7620...2.0..1.194.2109.0j17.....0....1..gws-wiz.....0..0i131.r5iwblzuMKU&ved=0ahUKEwiX6rWMpMnkAhUQnZ4KHYx4C4gQ4dUDCAs&uact=5#spf=1568222516736 (last accessed December 20, 2019).

built to store cars waiting to be worked on. So it's filled with cars, and only rarely people. It's not even the same as a public parking lot.

The Eighth Circuit rightly noted that generic "burglary is not limited to 'especially dangerous' burglaries." *Faulkner*, 926 F.3d at 479 (quoting *Taylor*, 495 U.S. at 597). But that misses the point. Congress singled out burglary for inclusion into ACCA and excluded other property crimes like larceny and *auto theft* because burglary was more inherently dangerous than these crimes. The reason burglary is more inherently dangerous than auto theft—where passerby could certainly encounter the offender and a confrontation could ensue—is because the location broken into (a building or structure) has an apparent potential for regular occupancy that a mere car does not. The fence in *Gray* protected cars, and these could be all ordinary cars that would not have been adapted or customarily used for overnight accommodation. It makes no sense to conclude that breaking into ordinary cars is not burglary, but that it somehow becomes burglary when they are enclosed in an outdoor fence with no roof that does not enclose or adjoin a building. No reasonable person would expect such an enclosed area to often have people in it, and no reasonable person would say that such a fence has the apparent potential for regular occupancy. It plainly doesn't. This is why a *Gray* fence is not a *structure* for purposes of generic burglary, and this is why the Eighth Circuit erred in concluding that Indiana burglary is not broader than generic burglary.

Moreover, the Eighth Circuit's contrary holding deviates from the reasoning and guidance about what locations qualify that *Taylor* gleaned from the ACCA's history. The original ACCA statute defined burglary only in reference to a building

as "'any felony consisting of entering or remaining surreptitiously within a *building* that is property of another with intent to engage in conduct constituting a Federal or State offense.'" *Id.* at 581 (quoting 18 U.S.C. § 1202(c)(9) (1982)). A building is the only location in that definition.

To be sure, this definition was removed in a 1986 amendment. But the definition still has value in sussing out the contours of generic burglary. *Taylor* was aware the definition was removed and still heavily relied on it when formulating its definition of generic burglary. *Taylor*, 495 U.S. at 518, 589-90, 598. *Taylor* suggested that removing this original definition of burglary may have been inadvertent. *Taylor*, 495 U.S. at 589-90. Moreover, *Taylor* reasoned that "*there is nothing in the history to show that Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different. Although the omission of a pre-existing definition of a term often indicates Congress' intent to reject that definition, we draw no such inference here*." *Id.* (emphasis added).

Later in the opinion, *Taylor* used even stronger language, emphasizing that its definition of generic burglary is "nearly identical" to the former statute's definition: "the 1984 definition, however, was not explicitly replaced with a different or narrower one; the legislative history discloses that no alternative definition for burglary was ever discussed. *As we have seen, there simply is no plausible alternative that Congress could have had in mind*." *Id.* at 598 (emphasis added). *Taylor* concluded that omitting a "definition of burglary in the 1986 Act therefore implies, at most, that Congress did not wish to specify an exact formulation that an offense must meet in order to count as 'burglary' for enhancement purposes. *Id.* at 598-99.

Stitt's extension of generic burglary to cover "a structure or vehicle that has been adapted or is customarily used for overnight accommodation" makes sense given this history. *Stitt*, 139 S. Ct. at 403. Burglary was included over other property crimes like auto theft because burglary was inherently dangerous in a way these other crimes weren't. The reason why it was more inherently dangerous was because breaking into a structure with the apparent potential for regular occupancy posed a risk of confrontation greater than these other property crimes. Buildings obviously have an apparent potential for regular occupancy, as do structures or vehicles that have been adapted or are customarily used for overnight accommodation. So *Taylor* recognized that the generic definition of burglary hewed closely to a building but left room to include other structures that shared the attributes that made breaking into buildings more dangerous than other property crimes.

The Model Penal Code—which *Taylor* relied on in formulating its generic definition—sums up the connection between buildings and structures that qualify for burglary nicely. The MPC limits burglaries to "a building or occupied structure." MPC § 221.1(1) (Am. Law Inst. 1980). It defines *occupied structure* as "any structure, vehicle, or place adapted for overnight accommodation of person, or for carrying on business therein, whether or not a person is present." MPC § 221.0(1).

The MPC commentary explains that key to understanding what is included by the terms *building* and *occupied structure* is the "apparent potential for regular occupancy". MPC § 221.1, cmt. 3(b), p. 72. Using this concept as a limiting principle "results in considerably narrower coverage than was achieved by many of the statutes in effect at the time the Model Code was drafted, which often extended burglary law

to *any* structure or vehicle." *Id.* (emphasis added). From *Stitt*, we know that breaking into *any* vehicle will not suffice for generic burglary. So the MPC's definition of burglary and reasoning behind it fits.

Moreover, limiting "the offense to buildings and other occupied structures confines it to those intrusions that are typically the most alarming and dangerous." *Id.* Again this fits with including burglary under the ACCA but not other property offenses like auto theft because burglary is more inherently dangerous. The MPC explains that it appended the adjective *occupied* onto only the term *structure* and not *building* "because buildings are generally employed by human beings in ways that amount to occupancy. It therefore seemed unnecessary to require that the prosecutor prove the adaptability of a building for occupancy in the normal case." *Id.* But for "structures other than buildings, *e.g.*, mines or ships, the prosecution would have to allege and prove occupancy." *Id*. From this perspective, the

> structure would thus have to be a place that is adapted for overnight accommodation or for the ordinary carrying on of business. This requirement is significant chiefly in relation to vehicles. It serves to exclude from burglary intrusions into freight cars, motor vehicles other than home trailers or mobile offices, ordinary small watercraft, and the like. The fact that a person *could* sleep or conduct business in such a place is not determinative. Such places are nevertheless not the sorts of facilities that ordinarily would put an intruder on notice that they may be in use for such purposes.

Id. (emphasis in original).

Using the "apparent potential for regular occupancy" as the key limiting principle also accords with *Stitt's* observation that burglarizing a summer home in the winter is still burglary. *Stitt*, 139 S. Ct. at 406.

> Actual presence is not required because the presence or absence of a person in a structure that is normally occupied will often be purely a matter of chance so far as the intruder is concerned. The intruder is ordinarily well able to judge whether the structure is a dwelling, store, factory, warehouse, or other place where people might normally be present. It is enough to require that the structure be one that is normally occupied and that the defendant be reckless as to its character as such. If these requirements are satisfied, the fortuity of a person's actual presence or absence is irrelevant.

MPC § 221.1, cmt. 3(b), p. 72.

A *Gray* fence is not a place where people might normally be present. It's a place where cars waiting to be worked on are stored. And because the vehicles temporarily parked inside it could all be ordinary vehicles that are not adapted or customarily used for overnight accommodation, a *Gray* fence exceeds the limitations *Stitt* placed on the term *structure*. A *Gray* fence is not a building, and it's nothing like an occupied structure. You wouldn't expect to find someone sleeping inside a *Gray* fence or conducting business there. It's for commercial storage. For these reasons, a *Gray* fence is broader than the term *structure* in generic burglary. Faulkner urges the Court to grant his certiorari petition to ensure that the principles articulated in *Stitt* are correctly applied to state burglary statutes that allow convictions for breaking into *Gray* fences.

CONCLUSION

For all these reasons, Petitioner asks the Court to grant this Petition for a Writ of Certiorari.

Dated: December 20, 2019

Respectfully submitted,

s/ Robert Meyers

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