No. _____

IN THE

Supreme Court of the United States

ALFRED MONTGOMERY, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state burglary offense is categorically broader than generic burglary under the Armed Career Criminal Act when it can be committed without entry into an enclosed space, such as simply walking under a carport, and can be committed by breaking into structures designed to hold only property and not people.

2. Whether a defendant who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a), is automatically entitled to plain-error relief if the district court did not advise him that one element of that offense is knowledge of his status as a felon, regardless of whether he can show that the district court's error affected the outcome of the proceedings.

   The second question presented is the same question that is currently before this Court in *United States v. Gary*, No. 20-444 (*cert. granted* Jan. 8, 2021). Accordingly, if this Court determines that review of the first question presented is unwarranted, the Court should hold Mr. Montgomery's petition pending resolution of *Gary*.

RELATED PROCEEDINGS

United States Court of Appeals for the Fifth Circuit:

> *United States v. Alfred Montgomery, III*, No. 19-30469 (5th Cir. Sept. 10, 2020) (reported at 974 F.3d 587)

United States District Court for the Eastern District of Louisiana:

> *United States v. Alfred Montgomery, III*, No. 2:16-CR-225-1 (E.D. La. June 7, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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Petitioner Alfred Montgomery, III, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's published decision affirming Mr. Montgomery's conviction and sentence under 18 U.S.C. § 922(g), *United States v. Montgomery*, 974 F.3d 587 (5th Cir. 2020), is included as an appendix.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on September 10, 2020. No petition for rehearing was filed. This Court entered an order on March 19, 2020, extending the deadline to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. Because that date fell on a Sunday, this petition is being timely filed on February 8, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g) states in relevant part:

> 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 . . . possess in or affecting commerce, any firearm or ammunition . . . .

18 U.S.C. § 924(e)(2)(B) defines the term "violent felony," in relevant part, as:

> [A]ny 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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

La. R.S. 14:62.2 defines simple burglary of an inhabited dwelling as:

> the unauthorized entry of any inhabited dwelling, house, apartment, or other structure used in whole or in part as a home or place of abode by a person or persons with the intent to commit a felony or any theft therein[.]

INTRODUCTION

The primary question presented by this Petition arises from sustained confusion among the Courts of Appeal over how to apply this Court's generic definition of "burglary" for purposes of the Armed Career Criminal Act—a hugely impactful statutory sentencing enhancement that transforms the ten-year maximum sentence for certain firearms offenses to a harsh, fifteen-year mandatory minimum. This confusion has resulted in arbitrary treatment of similarly situated defendants, great unpredictability in sentencing, and, as this case illustrates, an expansion of the meaning of "burglary" to reach conduct that no longer resembles the generic version of the offense first described by this Court in *Taylor v. United States*. Indeed, courts have so struggled with identifying and applying a uniform, generic definition of burglary that the Sentencing Commission gave up entirely—removing burglary from a parallel Sentencing Guidelines provision. *See* U.S.S.G. App. C, amend. 798.

Perhaps most intractable is the ongoing confusion over how to determine what types structures fall under the reach of so-called "generic burglary." The Fifth Circuit's decision below illustrates that confusion, abandoning this Court's previous focus on the function and physical features of a structure, in favor of a bright-line rule that *all* structures—even those that are wholly unenclosed and those designed to exclusively house property rather than people—can be burglarized, so long as they are sufficiently near a residence. The Fifth Circuit is not alone in its inability to reconcile the various component parts of this Court's long line of "generic burglary" jurisprudence, and this Court's intervention is necessary to correct course.

STATEMENT OF THE CASE

A. The Armed Career Criminal Act and "Generic Burglary."

The Armed Career Criminal Act imposes a fifteen-year mandatory minimum prison sentence on those convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) if they have three prior convictions for a violent felony or serious drug offense. 18 U.S.C. § 924(e)(1). As relevant here, the term "violent felony" is defined to include "any . . . burglary, arson, or extortion" that is "punishable by imprisonment for a term exceeding one year." § 924(e)(2)(B). In listing those enumerated offenses, this Court has held that "Congress referred only to their usual or (in [the Court's] terminology) generic versions—not to all variants of the offenses." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (citing *Taylor* v. *United States*, 495 U.S. 575, 598 (1990)).

To determine whether a defendant's prior conviction qualifies as one of those enumerated crimes under ACCA, courts "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.,* the offense as commonly understood." *Descamps v. United States*, 570 U.S. 254, 257 (2013). Under this "categorical approach," courts "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the] generic [offense], while ignoring the particular facts of the case." *Mathis*, 136 S. Ct. at 2248. A conviction for burglary, arson, or extortion only will qualify as an ACCA predicate offense if the elements of the statute of conviction "are the same as, or narrower than, those of the generic offense." *Id.* (emphasis omitted). If, on the other hand, the prior

offense sweeps more broadly than the generic crime, it cannot serve as an ACCA predicate, regardless of the "the defendant's actual conduct (*i.e.*, the facts of the crime)." *Id*.

Application of the categorical approach to a prior burglary conviction requires special care because of the wide variation in how that term is used from state to state. As this Court explained in *Taylor v. United States*: "The word 'burglary' has not been given a single accepted meaning by the state courts; the criminal codes of the States define burglary in many different ways." 495 U.S. at 580. Surveying ACCA's legislative history, historical sources, and model burglary provisions, the Court in *Taylor* ultimately defined generic burglary for ACCA purposes as the "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 598. In doing so, the Court drew upon the Model Penal Code's definition of burglary: "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." *Id*. at 598 n.8 (quoting Model Penal Code § 221.1 (1980)). And the Court stressed that this categorical approach inevitably would result in the exclusion of some state burglary statutes from ACCA's reach if, for example, they "eliminate[ed] the requirement that the entry be unlawful," or "include[ed] places, such as automobiles and vending machines, *other than buildings*." *Id*. at 599 (emphasis added).

The Court's analysis also took into account congressional intent and the context in which "burglary" is used in the statute—i.e., within the umbrella of the term "*violent* felony." The Court observed that burglary's inclusion in ACCA was based on the inherent dangerousness of that particular crime in its typical form, explaining:

> 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.

Id. at 588; *see also Begay v. United States*, 553 U.S. 137, 144–45 (2008) (observing that ACCA's enumerated offenses "all typically involve purposeful, violent, and aggressive conduct" (internal quotation marks omitted)).

Since *Taylor*, this Court has addressed the scope of generic burglary on numerous occasions—most relevant here, clarifying the meaning of the "building and other structure" element of generic burglary's definition and the types of places that so qualify under the uniform, generic conception of the crime. For example, in *Shepard v. United States*, the Court explained that ACCA "makes burglary a violent felony only if committed in a building or *enclosed space* . . . , not in a boat or motor vehicle." 544 U.S. 13, 15–16 (2005) (emphasis added). Along those same lines, the Court noted in *James v. United States* that Florida burglary's inclusion of entry onto a dwelling's curtilage rendered the statute broader than generic burglary. 550 U.S. 192, 212 (2007), *overruled on other grounds*, *Johnson v. United States*, 576 U.S. 591

(2015). The Court explained: "[T]he inclusion of curtilage takes Florida's underlying offense of burglary outside the definition of 'generic burglary' set forth in *Taylor,* which requires an unlawful entry into, or remaining in, 'a *building or other structure*.'" *Id.* (emphasis in original) (quoting *Taylor*, 495 U.S. at 598).

Two subsequent cases endeavored to define the line between non-building structures that can be burglarized and those that will fall outside of generic burglary's reach—making clear that the *function* of those spaces is the key consideration. First, in *Mathis*, this Court agreed that an Iowa burglary statute was broader than generic burglary. 136 S. Ct. at 2250. In doing so, the Court noted that *Taylor*'s definition of generic burglary requires unlawful entry into a "building or other structure," but Iowa burglary covers "a broader range of places," namely "any building, structure, . . . land, water or air vehicle, or similar place adapted for overnight accommodation of persons [or used] for the *storage or safekeeping of anything of value*"—which Iowa courts had construed to covered ordinary vehicles because they can be used for *storage or safekeeping*. *Id.*; Iowa Code § 702.12 (2013); *United States v. Stitt*, 139 S. Ct. 399, 407 (2018) (summarizing the Iowa statute at issue in *Mathis*). In other words, *Mathis* held that "burglary of certain nontypical structures and vehicles fell outside the scope of the federal Act's statutory word 'burglary.'" *Stitt*, 139 S. Ct. at 407.

In *Stitt v. United States*, however, the Court clarified for the first time that not *all* nontypical structures and vehicles fall outside of generic burglary's reach; the *function* of those places matters. The Court held that the generic definition

encompasses any "burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation." 139 S. Ct. at 404, 406. The Court reasoned that "[a]n offender who breaks into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily used for lodging runs a similar or greater risk of violent confrontation" compared to one who breaks into a home. *Id*. at 406. In other words, the Court distinguished between nontypical structures that are designed or adapted to hold *people*, versus those whose only function is to hold *property*, such as those covered by the Iowa statute in *Mathis*. *See id*. at 407 (distinguishing Iowa's burglary statute on the ground that courts "construed that statute to cover ordinary vehicles because they can be used for storage or safekeeping").

In passing, the Court also rejected an alternative argument that Tennessee's burglary statute is broader than generic burglary because it "covers the burglary of a 'structure *appurtenant to or connected with*' a covered structure or vehicle," a provision the defendant urged included "the burglary of even *ordinary vehicles* that are plugged in or otherwise appurtenant to covered structures." *Id*. at 406 (emphasis added) (quoting Tenn. Code Ann. § 39–14–401(1)(C)). The Court explained that this "appurtenant" provision did not, as the defendant suggested, cover ordinary vehicles merely positioned near houses, but only "structures," and therefore was not fatal to the statute's ability to fit within the generic burglary definition.

At least two circuits—the Sixth and now the Fifth in this case—have read that passing reference in *Stitt* to mean that *any* structure—no matter its form or

function—necessarily will fall within the scope of generic burglary so long as it is appurtenant to or connected with a home. *See United States v. Montgomery*, 947 F.3d 587, 593 (5th Cir. 2020) ("[T]he Supreme Court expressly held in *Stitt* that generic burglary covers 'burglary of a structure appurtenant to or connected with a covered structure.'"); *Malone v. United States*, 791 F. App'x 543, 546 (6th Cir. 2019) ("[T]he *Stitt* Court held, when considering the same Tennessee statute, that appurtenant structures fall within the generic burglary definition.").

B. Louisiana Burglary of an Inhabited Dwelling.

At issue in this case is whether Louisiana burglary of an inhabited dwelling is a categorical match for generic burglary. That statute—La. R.S. 14:62.2—encompasses "the unauthorized entry of any inhabited dwelling, house, apartment, or other structure used in whole or in part as a home or place of abode by a person or persons with the intent to commit a felony or any theft therein[.]" Importantly, Louisiana courts interpret the phrase "any inhabited dwelling . . . or other structure used in whole or in part as a home or place of abode" to include certain *unenclosed* spaces that are merely adjacent to the dwelling itself. Indeed, merely walking under a carport—consisting of four poles and no walls—and taking an object from that space qualifies as burglary of an inhabited dwelling in Louisiana. *See, e.g.*, *State v. Mitchell*, 181 So. 3d 800 (La. App. 2015) (surveying cases and affirming La. R.S. § 14:62.2 conviction for taking a four-wheeler from under a carport).

Louisiana courts also include within the statute's reach uninhabitable structures designed to house property, not people—such as sheds and storerooms—

so long as those structures are proximate to a dwelling. *State v. Bryant*, 775 So. 2d 596, 599 (La. App. 2000) (affirming La. R.S. § 14:62.2 conviction for taking tools from a carport storeroom); *State v. Harris,* 470 So.2d 601, 602–03 (La. App. 1985) (same). Indeed, attempting to break the window of a shed located on the curtilage of a residence qualifies as burglary of an inhabited dwelling in Louisiana. *See State v. Ennis*, 97 So. 3d 575, 578-79 (La. App. 2012).

C. Proceedings Below.

In June 2016, Alfred Montgomery sold a pistol to an undercover officer in a Piggly Wiggly parking lot for $200. Later that month, he sold a second firearm to the same undercover officer, again for $200, and the officer also purchased a small amount of marijuana for $20. As a result, in December 2016, Mr. Montgomery was charged with two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and a single count of distributing a quantity of marijuana, in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(D). Mr. Montgomery ultimately pleaded guilty to all three counts.

Mr. Montgomery's Pre-sentence Report (PSR) described three prior convictions. First, in October 2007 at the age of 18, Mr. Montgomery was arrested for the sale of cocaine in Mississippi. Second, in April 2009 at the age of 19, Mr. Montgomery was arrested for simply burglary of an inhabited dwelling in Louisiana. And, finally, in August 2010 at the age of 21, Mr. Montgomery was arrested for burglary of a dwelling in Mississippi. The PSR initially calculated Mr. Montgomery's advisory sentencing Guidelines Range as 46 to 57 months, with a

statutory maximum sentence of ten years for the § 922(g) counts and five years for the marijuana count. At the government's urging, however, the PSR revised that calculation, concluding that Mr. Montgomery qualified as a career offender under ACCA. In addition to ACCA's 15-year mandatory minimum for each firearm count, application of the enhancement caused Mr. Montgomery's Guidelines range to nearly triple, becoming 151 to 188 months of imprisonment—or, practically, 180 to 188 months due to ACCA's mandatory minimum.

The defense objected, arguing, in relevant part, that the Louisiana burglary statute under which Mr. Montgomery was convicted—La. R.S. 14:62.2—is categorically broader than generic burglary and therefore does not qualify as a violent felony predicate under ACCA. The district court sided with the government and, applying ACCA's enhancement, sentenced Mr. Montgomery to the 180-month mandatory minimum as to each firearm count and 60 months as to the marijuana count, all to run concurrently with one another.

The Fifth Circuit affirmed, rejecting Mr. Montgomery's argument that Louisiana burglary is broader than generic burglary because it encompasses unenclosed spaces and structures designed to hold only property and not people. In doing so, the court also rejected the contention, stated by this Court in *Shepard*, that generic burglary is limited to "enclosed spaces," as well as the contention, supported by *Mathis* and *Stitt*, that non-typical structures only fall under burglary's generic definition if they are either adapted or customarily used for overnight accommodation. *Montgomery*, 974 F.3d at 593. Instead, seizing on this Court's line in

Stitt about "appurtenant structures," the court held that *all* "buildings [and] structures"—regardless of their form or function—fall within generic burglary so long as they are "appurtenant to or connected with a covered structure." *Id.* (quoting *Stitt*, 139 S. Ct. at 406–07). The Court concluded: "Because the Louisiana cases Montgomery cites all concerned a structure appurtenant to or connected with a residential home, he has failed to show that any Louisiana court 'has applied the statute in a broader manner'" than generic burglary. *Id.* (quoting *United States v. Albornoz-Albornoz*, 770 F.3d 1139, 1141 (5th Cir. 2014)).

D. Independent *Rehaif* error.

In addition to the ACCA error, Mr. Montgomery also raised an independent issue on appeal arising from this Court's decision in *Rehaif v. United States*—an issue that this Court already is set to review in *United States v. Gary*, No. 20-444 (*cert. granted* Jan. 8, 2021). In *Rehaif*—decided immediately after Mr. Montgomery filed his notice of appeal to the Fifth Circuit—this Court held for the first time that, for convictions under § 922(g), the government must show not only "that the defendant knew he possessed a firearm" but *also* "that he knew he had the relevant status when he possessed it" (commonly referred to as the "knowledge-of-status" element). *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019).

While the indictment in Mr. Montgomery's case alleged that he knowingly possessed a gun with respect to the two § 922(g) counts, it did not allege that he knew of his relevant status that prohibited him from possessing a firearm—i.e., that he was a felon. Like the indictment, the factual basis drafted by the government and signed

by the parties in support of the plea did not state that Mr. Montgomery knew that he had the relevant prohibited status at the time he possessed the gun, and Mr. Montgomery at no time stipulated to that fact. At Mr. Montgomery's plea hearing, the district judge explained the elements of § 922(g) before accepting Mr. Montgomery's plea but did not notify him of the knowledge-of-status element.

Thus, on appeal to the Fifth Circuit, Mr. Montgomery urged that this Court's intervening decision in *Rehaif* required vacatur of his conviction. Specifically, Mr. Montgomery argued that the lack of notice of the crime's elements and his resulting unknowing and involuntary guilty plea required automatic reversal under the structural error doctrine, despite the fact that the error was unpreserved. In the alternative, Mr. Montgomery argued that he could satisfy the elements of plain error review.

In accordance with circuit precedent decided shortly after briefing in Mr. Montgomery's case was complete, the Fifth Circuit rejected his structural error argument. *Montgomery*, 974 F.3d at 590 (citing *United States v. Lavalais*, 960 F.3d 180, 186 (5th Cir. 2020)). Applying plain error review, the court concluded that Mr. Montgomery failed to demonstrate "a reasonable probability that, but for the error, he would not have entered the plea, and therefore he has not shown that the district court's error affected his substantial rights." *Id.* at 591. Under the circuit's demanding prejudice inquiry applicable to Rule 11 defects—i.e., errors in the district court's plea colloquy—the court determined that Mr. Montgomery could not make that showing and therefore affirmed his conviction.

Last month, this Court granted certiorari in *Gary* to address the same issue raised by Mr. Montgomery in his appeal, namely, whether a defendant who pleaded guilty to possessing a firearm as a felon is automatically entitled to plain-error relief if the district court did not advise him that one element of that offense is knowledge of his status as a felon, regardless of whether he can show that the district court's error affected the outcome of the proceedings.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit erred in concluding that Louisiana burglary of an inhabited dwelling categorically qualifies as a generic burglary and, in doing so, created a peculiar bright-line rule that ignores the form and function of a burglarized structure in favor of a strict focus on a structure's proximity to a brick and mortar home. That rule re-writes this Court's caselaw, ignoring the requirement that burglarized spaces must at least be enclosed, as well as this Court's focus on the function of nontypical structures and its warning that a home's curtilage does not fall under generic burglary's scope.

Indeed, the Fifth Circuit's misread of *Stitt* and resulting rule promises to create absurd results—pulling within generic burglary's reach crimes that bear no resemblance to the offense described in *Taylor*, such as merely stealing a package from a front porch or simply walking into a gazebo on a home's curtilage to snatch an object contained therein. At least two circuits appear now to have incorporated this misread of *Stitt* into their ACCA jurisprudence—an error that not only conflictd with this Court's caselaw, but also is in tension with circuit cases that rightfully have focused on the form and function of structures covered by state burglary statutes, rather than their mere proximity to dwellings. This case provides an ideal vehicle for clarifying *Stitt*'s discussion of "appurtenant structures" and for reconciling that discussion with this Court's past treatment of the "building and other structure" element of generic burglary described in *Taylor*.

I. The Fifth Circuit's decision is wrong and illustrates continued circuit confusion over how to harmonize the component parts of this Court's "generic burglary" precedent.

This Court has made clear that, when determining whether a state burglary offense falls within the bounds of generic burglary for ACCA purposes, both the form and function of the spaces encompassed by the statute matter. Indeed, only *enclosed spaces* can be burglarized within the meaning of the offense's generic definition, *see Shepard*, 544 U.S. at 15–16, and mere curtilage always is excluded, *see James*, 550 U.S. at 212. Moreover, this Court has drawn a clear line based on a structure's use: breaching spaces designed only to safeguard property rather than hold people is not the type of offense that fits within the standard, generic understanding of burglary. *See Stitt*, 139 S. Ct. at 407. That makes sense: Congress did not intend to bring broad swaths of nonviolent property crime within ACCA's scope. Instead, Congress enumerated a specific set of offenses that "typically involve purposeful, violent, and aggressive conduct." *Begay*, 553 U.S. at 144–45. Burglary so qualifies because it typically requires entry into an enclosed space *where people typically may be found*, raising the possibility of a dangerous confrontation with an occupant. *Taylor*, 495 U.S. at 588.

The Fifth Circuit ignored these commands, instead adopting a bright-line rule based on a misread of this Court's decision in *Stitt*: generic burglary covers *any* structure—regardless of its form or function—so long as it is "appurtenant to or connected with a residential home." *Montgomery*, 974 F.3d at 593. That is true, according to the Fifth Circuit, regardless of whether the intruded upon space is unenclosed and regardless of whether the breached structure was specifically

designed to hold property and not people. This broad definition includes merely walking under a carport with no walls to remove an item, as well as breaking into a shed—behavior that should have rendered La. R.S. 14:62.2 broader than generic burglary and, therefore, an invalid ACCA predicate. *See, e.g.*, *Mitchell*, 181 So. 3d at 800; *Ennis*, 97 So. 3d at 578–79.

But the Fifth Circuit's conception of burglary reaches further even than carports and utility sheds. Indeed, under the Fifth Circuit's view, generic burglary would include walking onto a front porch to snatch a package. Even "gazebos" and "doll houses" would qualify as covered structures in the Fifth Circuit's view, so long as they were appurtenant to a brick and mortar residence. *United States v. Stitt*, 860 F.3d 854, 879 (6th Cir. 2017), *rev'd*, 139 S. Ct. 399 (2018) (Sutton, J., dissenting). That, of course, is not "burglary" as this Court has understood it. Indeed, "[a] would-be burglar cannot 'break and enter' into those structures because, as a matter of function, they're not designed to house people and property securely." *Id.* And, as a matter of simple logic, a would-be burglar cannot "break and enter" into a carport, because there is nothing to "break into" nor anything to "enter into." *See Descamps*, 570 U.S. at 261 (explaining that generic burglary requires elements of "unlawful or unprivileged *entry into*, or remaining in, a building or structure, with intent to commit a crime" (emphasis added)).

In other words, the intended function of the structure necessarily matters, as does its physical features—required considerations that the Fifth Circuit expressly eliminated from the analysis in favor of an approach that considers mere proximity

to a residence. *See Montgomery*, 947 F.3d at 593 (rejecting the argument that "the 'building or structure' component of generic burglary is limited to buildings, enclosed spaces, and structures or vehicles adapted or customarily used for overnight accommodation"). That a plainly disqualified structure—such as a gazebo—may be proximate to a qualifying one—such as a house—does not cure its own fatal defects.

The Fifth Circuit's decision illustrates the inter-circuit (and even intra-circuit) confusion over whether *Stitt* intended a rule that *all* non-traditional structures are included in generic burglary's reach so long as they are appurtenant to a traditional residence or, alternatively, whether covered nontypical structures are limited to those that are themselves intended for overnight accommodation. Importantly, Louisiana's burglary of a dwelling statute encompasses structures intended only for keeping property and not people—such as sheds—so long as they are near a dwelling. *See, e.g.*, *Ennis*, 97 So. 3d at 578–79. But this Court has made clear that the function of a nontypical structure will dictate whether or not it falls within the scope of generic burglary. Indeed, when this Court held that regular tents and regular vehicles fell outside of generic burglary's reach, there was no caveat that those structures were somehow transformed into places that could be burglarized so long as they sat sufficiently close to a brick and mortar residence. *Stitt*'s caveat, instead, focused on *function*: if those structures were used or adapted for overnight accommodation, they were covered structures under generic burglary.

The Fifth Circuit is not alone in its confusion on this point. Although the Fourth Circuit has acknowledged that there is "explanatory language

in *Stitt* suggesting, but not holding, that the locational element of generic burglary might not encompass structures intended for the storage of property rather than for occupancy," the court nonetheless determined that *Stitt* was not sufficiently clear on the point to undo circuit precedent to the contrary. *United States v. Dodge*, 963 F.3d 379, 384 (4th Cir. 2020); *see also id.* ("[W]e are faced with prior Fourth Circuit precedent that could be read as being in tension with intervening Supreme Court reasoning but no directly applicable Supreme Court holding."). In other words, courts are struggling to untangle *Stitt's* limited inclusion of certain nontypical structures within generic burglary and to determine what *Stitt* means for nontypical structures *not* used to house people.

Notably, unlike the Fourth and Fifth Circuits, some circuits *have* endeavored to differentiate between structures intended for habitation versus those used only "for the storage or safekeeping of property"—recognizing that function does matter. *See, e.g.*, *United States v. Jones*, 951 F.3d 1138 (9th Cir. 2019) (noting that, because Colorado's statutory definition of "building" included "structures that are designed to shelter only property," it covered "significantly more than the generic [burglary] element of 'building or other structure'"); *Greer v. United States*, 938 F.3d 766, 776–77 (6th Cir. 2019) (determining that an Ohio aggravated burglary statute that "cover[ed] an expansive array of structures" aligned with generic burglary because of the additional requirement that a person either be "present" or "likely to be present," which "restrict[ed] the statute's scope to only those structures that carry an increased risk of a violent encounter between perpetrator and occupant"). *But see Malone*, 791

F. App'x at 546 (the Sixth Circuit suggesting that all "structures" fall under generic burglary so long as they are appurtenant to or connected with a dwelling).

Thus, the Fifth Circuit's decision not only is wrong, but there now is circuit tension over how to reconcile *Stitt*'s passing mention to "appurtenant structures" with this Court's other cases defining the bounds of *Taylor*'s "buildings or other structures" element of generic burglary. Review of the question presented here would resolve this confusion and ensure uniformity and fair treatment of criminal defendants affected by ACCA's harsh mandatory minimum.

II. This issue is important, and Mr. Montgomery's case is an ideal vehicle to decide the question presented.

The question presented has ramifications well beyond Mr. Montgomery's case and even beyond the Louisiana statute at issue. Courts have consistently struggled with application of the generic burglary definition under this broadly applicable and hugely impactful sentencing statute. Indeed, the confusion over this issue has been so intractable that the Sentencing Commission abandoned the offense entirely in its parallel career offender provision. *See* U.S.S.G. App. C, amend. 798. Moreover, circuit division over the types of structures that qualify under generic burglary results in unfair and improper disparate treatment of numerous ACCA defendants, based solely on the jurisdiction in which they are sentenced. That defies ACCA's purpose, which Congress intended to create a uniform approach to sentencing enhancements—to avoid "the vagaries of state law" and to "protect offenders from the unfairness of having enhancement depend upon the label employed by the State of conviction." *Taylor*, 495 U.S. at 588–89.

Mr. Montgomery's case is an ideal vehicle for deciding the question presented. This issue was thoroughly pressed and passed upon at every stage of Mr. Montgomery's case and is therefore well preserved and ready for this Court's review. Moreover, the question presented here is outcome determinative. Absent qualification based on his conviction under La. R.S. 14:62.2, Mr. Montgomery would not have been subjected to ACCA's sentencing enhancement—without which he faced a ten year maximum sentence and an advisory Sentencing Guidelines range of 46 to 57 months. If he had received a sentence within that range, Mr. Montgomery—who entered federal custody in January 2017—would be nearing his release date or already would have completed his sentence. Instead, he now is serving a fifteen-year sentence and will not be released until 2029.

III. Even if this Court believes plenary review is unwarranted, the Court should summarily reverse.

The Fifth Circuit's decision so plainly conflicts with this Court's precedents that the Court should, in the alternative, summarily reverse. *See Maryland v. Kulbicki*, 136 S. Ct. 2, 3 (2015); *Martinez v. Illinois*, 572 U.S. 833, 843 (2014); *Grady v. North Carolina*, 575 U.S. 306, 311 (2015). Under *Taylor* and its progeny, simply walking under an open structure with no walls, picking up an object, and walking away plainly does not qualify under the generic definition of burglary, as it does not require entry into an enclosed space. Nor does the inclusion of such offenses under ACCA's reach further Congress's intent to include enumerated offenses that "typically involve purposeful, violent, and aggressive conduct." *Begay*, 553 U.S. at 144–45. Indeed, simply snatching an object from underneath an open carport bears

no resemblance to the particularly dangerous crime envisioned in *Taylor* and its progeny, namely, a person's unlawful entry into a building or other enclosed space, which "often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Taylor*, 495 U.S. at 588.

Moreover, the Fifth Circuit's blanket rule that any structure appurtenant to a residence *necessarily* qualifies as covered structure under the generic burglary definition promises to lead to more absurd results, such as inclusion of offenses like merely stealing a package from a front porch. And, unless this Court clarifies the bounds of generic burglary promptly, similarly situated defendants will receive vastly different sentences, depending upon the circuit in which they happened to have been sentenced.

Whether through plenary review or summary reversal, this Court should intervene.

IV. Alternatively, this Court should hold Mr. Montgomery's petition pending resolution of *United States v. Gary*.

If this Court determines that review of Mr. Montgomery's first question presented is unwarranted, he respectfully urges this Court to hold his Petition pending resolution of *United States v. Gary*, No. 20-444 (cert. granted Jan. 8, 2021). Briefing is currently under way in that case, which presents the second question raised by this Petition, namely, whether a defendant who pleaded guilty to possessing a firearm as a felon is automatically entitled to plain-error relief if the district court did not advise him that one element of that offense is knowledge of his status as a

felon, regardless of whether he can show that the district court's error affected the outcome of the proceedings.

Even if this Court ultimately determines that automatic reversal under the structural error doctrine is inappropriate and that some prejudice showing under plain error review is required, this Court still should vacate the Fifth Circuit's judgment and remand Mr. Montgomery's case for further consideration in light of the standard announced. As illustrated by this case and others, the Fifth Circuit applies a hyper-restrictive view of the "substantial rights" requirement of the plain error standard in this context. *See, e.g.*, *Lavalais*, 960 F.3d at 187 (holding that a defendant could not show that there was "reasonable probability that he would not have pled guilty had he known of *Rehaif*," because, "[i]n his factual basis, [he] admitted that he was a felon convicted of a crime punishable by more than one year"). Accordingly, even if this Court ultimately determines that *Rehaif* error is not structural error mandating automatic reversal and articulates a different review framework instead, this Court should remand Mr. Montgomery's case to the Fifth Circuit for consideration of his *Rehaif* claim under that correct prejudice framework.

CONCLUSION

For the foregoing reasons, Mr. Montgomery respectfully requests that his petition for a writ of certiorari be granted with respect to the first question presented. In the alternative and with respect to the second question presented, Mr. Montgomery respectfully requests that his petition be held pending this Court's resolution of *United States v. Gary*, No. 20-444 (*cert. granted* Jan. 8, 2021).

Respectfully submitted February 8, 2021,

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