NO. 17-766

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA—PETITIONER

VS.

JASON DANIEL SIMS—RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether unlawful entry into an unoccupied vehicle or other conveyance that is adapted or customarily used for overnight accommodation constitutes generic burglary under the Armed Career Criminal Act, codified in 18 U.S.C. § 924(e)(2)(B)(ii).

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OPINION BELOW

The opinion of the court of appeals is reported at 854 F.3d 1037 and reproduced at Pet. App. 1a-7a.

JURISDICTION

The Court of Appeals entered its judgment on April 27, 2017. A petition for rehearing was denied on August 3, 2017. The petition for a writ of certiorari was filed on November 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent, Jason Daniel Sims, pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (Cert. Pet. at 2).

Usually, the statutory range for a § 922(g)(1) violation is zero to ten years' imprisonment. *See* 18 U.S.C. § 924(a)(2). When a defendant is sentenced under the Armed Career Criminal Act (ACCA), however, the statutory range is elevated to fifteen years to life imprisonment. *See* 18 U.S.C. § 924(e)(1). A defendant is sentenced under the ACCA if he or she "has three previous convictions . . . for a violent felony or a serious drug offense." § 924(e)(1). Under the ACCA, a "violent felony," among other things, is any crime punishable by imprisonment exceeding one year that is "burglary, arson, or extortion, [or] involves use of explosives." § 924(e)(2)(B)(ii).

Based partly on Respondent Sims's two prior Arkansas residential burglary convictions, the district court designated him an armed career criminal and sentenced him to 210 months' imprisonment, followed by three years of supervised release. (Cert. Pet. at 3-4).

Respondent Sims appealed his sentence to the Court of Appeals for the Eighth Circuit. He argued that Arkansas's residential burglary statute—Ark. Code Ann. § 5-39-201(a)(1) (2002)—sweeps more broadly than generic burglary because it encompasses the unlawful entry of vehicles, watercrafts, and aircrafts.[1] *See* Ark. Code

[1] In Arkansas, people have been charged with residential burglary for breaking into unoccupied recreational vehicles (RV), *see* http://www.baxtercountysheriff.com/press_view.php?id=1670, and unoccupied houseboats, *see* http://dev.ozarkareanetwork.com/two-arrested-after-reportedly-burglarizing-house-boat-on-lake-norfork.

Ann. § 5-39-101(8)(A) and (9) (2002). (Cert. Pet. App. at 3a-4a). Respondent Sims further argued that the statute was indivisible because vehicles, watercrafts, and aircrafts are alternative means of satisfying its locational element—"residential occupiable structure." The government conceded that the statute was indivisible. (Cert. Pet. App. at 3a).

The government argued, however, that because "Arkansas residential burglary statute applies only to vehicles '[i]n which any person lives' or '[t]hat [are] customarily used for overnight accommodation,' " the statute "criminalizes conduct that is 'the same as, or narrower than . . . the generic offense[.]' " (Cert. Pet. App. at 5a).

A unanimous panel of the court of appeals disagreed, holding that Arkansas's residential burglary statute categorically sweeps more broadly than generic burglary. (Cert. Pet. App. at 6a). In considering, but rejecting, the government's arguments, the court of appeals concluded that "it is inconsequential that Arkansas's statute confines residential burglary to vehicles '[i]n which any person lives' or [t]hat [are] customarily used for overnight accommodation.' " (Cert. Pet. App. at 6a). The court of appeals, therefore, vacated Respondent Sims's sentence and remanded for resentencing. (Cert. Pet. App. at 7a).

The government petitioned for rehearing en banc, which the court of appeals denied. (Cert. Pet. App. at 8a).

REASONS FOR DENYING THE WRIT

I. This Court has consistently affirmed that statutes that encompass unlawful entries into vehicles and other conveyances sweep more broadly than generic burglary.

This Court should deny certiorari in this case because it has stressed—repeatedly—that unlawfully entering a vehicle or other conveyance does not constitute generic burglary under the Armed Career Criminal Act (ACCA).

Congress enacted the first version of ACCA in 1984 and defined burglary 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." *Taylor v. United States*, 495 U.S. 575, 581 (1990) (emphasis added). In 1986, when Congress amended the ACCA, it left out the 1984 burglary definition.

In 1990, this Court was tasked with the responsibility of formulating a generic definition of burglary for ACCA sentencing-enhancement purposes. After examining the background of the ACCA and concluding that Congress may have inadvertently deleted the 1984 definition of burglary, this Court adopted a definition of generic burglary that "[wa]s practically identical to the 1984 definition." *Taylor*, 495 U.S. at 581-598.

Specifically, this Court outlined the elements of generic burglary as follows: (1) an unlawful or unprivileged entry into, or remaining in, (2) a building or other structure, (3) with intent to commit a crime. *Taylor*, 495 U.S. at 598. Although this Court left the terms "building or other structure" undefined, it left no doubt that vehicles and other conveyances do not fall under the "building or other structure"

umbrella. *See Taylor*, 495 U.S. at 599 (detailing that some states' burglary statutes define burglary more broadly than generic burglary by including places such as automobiles, boats, vessels, or railroad cars).

In identifying the elements of generic burglary, this Court relied on the Lafave and Scott treatise. *See Taylor*, 495 U.S. at 598 (citing Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13, n.3, § 8.13(a), p. 466 (1986) "(modern statutes 'generally require that the entry be unprivileged'); *id.*, § 8.13(c), p. 471 (modern statutes 'typically describe the place as a 'building' or 'structure' '); *id.*, § 8.13(e), p. 474 ('[T]he prevailing view in the modern codes is that an intent to commit any offense will do.')"). And on the exact same page of the treatise that this "Court cited for its proposition that generic burglary must occur in 'a building or other structure,' the authors explain that some state burglary statutes go farther" by extending to "other places, such as all or some types of vehicles." *See United States v. Herrold*, 14-11317, 2018 WL 948373, at *15 (5th Cir. Feb. 20, 2018); *United States v. Stitt*, 860 F.3d 854, 864 (6th. Cir. 2017) (Boggs, J., concurring). *See also* LaFave and Scott, § 8.13(c), 471 & n.85.

Among the burglary statutes listed as extending to "other places" is Texas burglary of a habitation provision, which defines "habitation" as "a structure or vehicle that is adapted for overnight accommodation of person[.]" *Herrold*, 2018 WL 948373, at *14-15; *Stitt*, 860 F.3d at 864. *See also* LaFave and Scott, § 8.13(c), 471 & n.85; Texas Penal Code § 30.01 (1986). So, LaFave and Scott—and by extension this

Court—"did not consider a vehicle adapted for overnight accommodation to count as 'a building or other structure[.]' " *Herrold*, 2018 WL 948373, at *15.

Moreover, post-*Taylor*, this Court reaffirmed that generic burglary excludes breaking into vehicles and other conveyances. *See, e.g.*, *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (noting that breaking into a vessel would not qualify as generic burglary, but breaking into a building would); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-87 (2007) (noting that "Massachusetts defines 'burglary' as including not only breaking into 'a building' but also breaking into a 'vehicle[,]' which falls outside the generic definition of 'burglary,' for a car is not a 'building or structure' "); *Shepard v. United States*, 544 U.S. 13, 15-16 (2005) (noting that burglary is a violent felony under the ACCA only if committed in a building or structure, "not in a boat or motor vehicle.").

Most recently, this Court reiterated that burglary statutes that encompass vehicles and other conveyances sweep more broadly than generic burglary. *See Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016).

The statute at issue in *Mathis* was Iowa's burglary statute. Iowa's burglary statute encompasses:

> any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place 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. Such a structure is an "occupied structure" whether or not a person is actually present.

Iowa Code § 702.12. In holding that Iowa's burglary statute "reaches a broader range of places" than generic burglary, this Court focused on the fact that the statute

encompasses "any building, structure, *[or] land, water, or air vehicle*." *Mathis*, 136 S. Ct. at 2250.

This Court made sure to emphasize that it based its holding on this fact alone. And it must not be ignored that this Court could have easily held that the Iowa statute was broader than generic burglary because it encompasses places "*occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value*." Instead, this Court chose to reaffirm that burglary statutes that encompass vehicles or other conveyances—regardless of their intended use or purpose—are broader than generic burglary.

So, for over 27 years this Court has consistently stated that statutes that encompass unlawful entries into vehicles and other conveyances fall outside the bounds of generic burglary.

This Court should therefore deny certiorari in this case.

II. To the extent there is a split among the circuits, it is a lopsided one.

The vast majority of federal courts of appeals that have considered this issue have held that generic burglary's "building or other structure" element does not encompass vehicles and other conveyances—regardless of their intended use or purpose. *See, e.g.*, *United States v. Bennett*, 100 F.3d 1105, 1109 (3d Cir. 1996) (holding that Pennsylvania's burglary statute—which confines coverage to vehicles adapted for overnight accommodation of persons, or for carrying on business—does not correspond with generic burglary, because "a state burglary statute 'including places, such as automobiles and vending machines, other than buildings' is a statute

that defines burglary more broadly than Congress's generic definition"); *United States v. White*, 836 F.3d 437, 445-46 (4th Cir. 2016) (holding that West Virginia's burglary statute—which confines coverage to vehicles "primarily designed for human habitation and occupancy and used as a dwelling regularly or only from time to time"—sweeps more broadly than generic burglary); *United States v. Stitt*, 860 F.3d 854, 858 (6th. Cir. 2017) (holding that Tennessee's burglary statute—which confines coverage to vehicles "designed or adapted for the overnight accommodation of persons"—is broader than generic burglary); *United States v. Sims*, 854 F.3d 1037, 1038 (8th Cir. 2017) (holding that Arkansas residential burglary statute—which confines coverage to vehicles in which a person lives or customarily used for overnight accommodation—sweeps more broadly than generic burglary); *United States v. Grisel*, 488 F.3d 844, 850-51 (9th Cir. 2007) (holding that Oregon's second-degree burglary statute—which confines coverage to booths, vehicles, boats, and aircrafts adapted for overnight accommodation of persons or for carrying on business—defines a crime more broadly than generic burglary); *United States v. Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010) (holding that Alabama's third-degree burglary statute—which confines coverage to vehicles, aircrafts, and watercrafts used for lodging of persons or carrying on business—is a non-generic burglary statute because "[e]ven if used for the lodging of persons or carrying on business therein,' vehicles, aircraft, and watercraft are not 'building[s] or structure[s]' in the generic burglary sense" (internal citations omitted)), *abrogated on other grounds as recognized by Howard*, 742 F.3d at 1344-45.

More than 21 years ago, the Tenth Circuit concluded that the statutory elements of Texas burglary of a habitation provision, which limits coverage to vehicles adapted for the overnight accommodations of persons, "substantially correspond to the generic elements of burglary contained in *Taylor*." *United States v. Spring*, 80 F.3d 1450, 1462 (10th Cir. 1996). In reaching its conclusion, the court exclusively relied on a Ninth Circuit case, *United States v. Sweeten*, 933 F.2d 765, 770 (9th Cir. 1991). *See Spring*, 80 F.3d at 1462 ("The Ninth Circuit in Sweeten considered this very argument, and we agree with its analysis[.]").

After *Spring* was decided, however, *Sweeten* was expressly overruled by *Grisel*, 488 F.3d at 844. Along with holding that Oregon's second-degree burglary statute is broader than generic burglary, the *Ninth Circuit* noted that "[t]o the extent that our precedents suggest that state statutes satisfy the categorical inquiry when they define burglary to include non-buildings adapted for overnight accommodation, they are overruled." *Id.* at 851 n.5.

Additionally, the Fifth Circuit recently held that the same Texas burglary statute at issue in *Spring* is indivisible and overly broad, and thus, does not correspond with generic burglary. *Herrold*, 2018 WL 948373. In so holding, the court concluded that the statue is "nongeneric because [subsection (a)(3) of the statute] criminalizes entry and subsequent intent formation rather than entry *with* intent to commit a crime." 2018 WL 948373, at *18.

As previously explained, the Fifth Circuit also alluded that Texas burglary of a habitation provision is broader than generic burglary because a vehicle adapted for overnight accommodation may not count as "a building or other structure." *Id.*

Post-*Mathis*, the Seventh Circuit is the only circuit that has held that burglarizing mobile structures may constitute generic burglary. *See Smith v. United States*, 877 F.3d 720, 722-25 (7th Cir. 2017). In *Smith*, the issue before the court was whether Illinois's residential burglary statute corresponds with generic burglary. Illinois's residential burglary statute provides, "[a] person commits residential burglary who knowingly and without authority enters the dwelling place of another with the intent to commit therein a felony or theft." *Smith*, 877 F.3d at 722. The term "dwelling" is defined as "a house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside." *Id.*

The defendants argued that the statute's locational element was overly broad because trailers are not structures since they are movable. *See id.* at 723. The court disagreed, concluding that occupied trailers counts as structures. *See id.*

The court also rejected the defendants' argument that the statute's locational element was overly broad because the "other living quarters" provision might include houseboats or tents or even cars. In rejecting this argument, the court concluded "that the crime of residential burglary in Illinois does not cover the entry of vehicles (including boats) and tents." *Id.* The court further clarified that "an unoccupied boat or motor vehicle is not a 'structure.' " *Id.* at 725.

So, although the Seventh Circuit held that burglarizing occupied mobile homes and occupied trailers may constitute generic burglary, the court did not rule definitively that burglarizing any vehicle or conveyance adapted or used for overnight accommodations constitutes generic burglary.

This Court should therefore deny the government's petition for certiorari in this case because there is no mature circuit split on this issue.

Furthermore, this Court should deny certiorari in this case because, as the government acknowledges in its petition for a writ of certiorari, this case is not the appropriate vehicle to resolve any perceived conflict among the circuits regarding this issue. (Cert. Pet. at 6).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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