No. 17-766

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JASON DANIEL SIMS

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

REPLY BRIEF FOR THE PETITIONER

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Respondent does not dispute the importance of the question presented, the frequency with which the issue arises, or the existence of conflicting authority in the circuits. As in *United States* v. *Stitt*, 860 F.3d 854 (6th Cir.) (en banc), petition for cert. pending, No. 17-765 (filed Nov. 21, 2017), the court of appeals in this case has unjustifiably narrowed the definition of generic "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), to the point where many jurisdictions lack any "burglary" offense at all. That error warrants this Court's correction. The Court should therefore grant review of the en banc decision in *Stitt*, which presents the most thorough analysis of the issue, and hold the government's petition for a writ of certiorari in this case pending *Stitt*'s resolution.

1. As discussed in the petition and reply brief in *United States* v. *Stitt*, No. 17-765 (filed Nov. 21, 2017), the court of appeals' crabbed interpretation of "burglary"—

which automatically excludes any state offense that criminalizes burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation—is incorrect. See Pet. at 10-17, *Stitt*, *supra* (No. 17-765); Reply Br. at 2-3, *Stitt*, *supra* (No. 17-765); see also Pet. 5-6.

In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court interpreted "burglary" under the ACCA based on the "sense in which the term is now used in the criminal codes of most States." *Id.* at 598. Like the Tennessee aggravated-burglary provision at issue in *Stitt*, *supra*, the Arkansas residential-burglary statute at issue here is comparable to or narrower than nearly all state burglary statutes in existence in 1986, when the current statutory language was adopted. See Pet. at 10-11, 13-14, *Stitt*, *supra* (No. 17-765); Reply Br. at 2, *Stitt*, *supra* (No. 17-765); see also Pet. 3-4 & n.*. It is also narrower than the Model Penal Code definition of burglary on which the Court relied in *Taylor*. See Pet. at 14, *Stitt*, *supra* (No. 17-765); Reply Br. at 2-3, *Stitt*, *supra* (No. 17-765). And by criminalizing the burglary of mobile and nonpermanent dwellings, Arkansas's residential-burglary statute recognizes that burglary's "inherent potential for harm to persons," *Taylor*, 495 U.S. at 588, is not limited solely to the invasion of certain kinds of homes, see Pet. at 12-14, *Stitt*, *supra* (No. 17-765).

Respondent does not dispute those points, see Br. in Opp. 4-7, but instead defends the decision below based on a misreading of this Court's prior decisions and a criminal-law treatise. First, respondent contends (Br. in Opp. 6-7) that this Court already has determined that burglary under the ACCA excludes "breaking into vehicles and other conveyances." As the government has explained, however, although the Court has made

clear that generic burglary does not encompass *all* unlawful entry into vehicles, automobiles, and vessels, it has not considered whether generic burglary encompasses unlawful entry into the subset of vehicles or other nonpermanent or mobile structures that are adapted or used for overnight accommodation. See Pet. at 15-16, *Stitt*, *supra* (No. 17-765); Reply Br. at 3, *Stitt*, *supra* (No. 17-765).

Second, respondent argues that the 1986 edition of 2 Wayne R. LaFave & Austin W. Scott, Jr.'s *Substantive Criminal Law* (LaFave), which *Taylor* consulted, distinguished burglary statutes whose locational element is described as a "building or other structure" from those "extending to 'other places, such as all or some types of vehicles.'" Br. in Opp. 5 (quoting LaFave § 8.13(c), at 471). As the *Stitt* petition explains (at 17), however, the treatise recognized that States had "broadly construed" the words "building" and "structure," and it explained that covering vehicles "may make sense in some circumstances, *as where the vehicle is a motor home*." LaFave § 8.13(c) & n.85, at 471-472 (emphasis added). The treatise therefore does not support constricting *Taylor*'s definition of ACCA "burglary"—as an offense "contain[ing] at least" the "elements" of "an unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime," 495 U.S. at 598—to exclude such structures, when most States included them.

2. Notwithstanding the undisputed importance of the question presented and the division in the circuits, respondent contends (Br. in Opp. 7-11) that this Court's review is unwarranted because the circuit conflict is "lopsided" and "no[t] mature." That contention is misplaced.

Like other courts of appeals, the court below recognized that "this issue has divided circuit courts." Pet. App. 5a; see Reply Br. at 4, *Stitt*, *supra* (No. 17-765). The Fourth, Sixth, and Ninth Circuits have adopted the same cramped definition of generic burglary that the Eighth Circuit embraced here,[*] while the Seventh and Tenth Circuits have held that burglary of a vehicle adapted for the overnight accommodation of persons constitutes generic burglary. See Pet. 6; Br. in Opp. 8-10; see also Pet. at 18-19, *Stitt*, *supra* (No. 17-765); Reply Br. at 4-6, *Stitt*, *supra* (No. 17-765). The Fifth Circuit previously reached that latter conclusion as well, in a panel decision that has since been superseded on other grounds by an en banc decision. See *United States* v. *Uribe*, 838 F.3d 667, 671 (2016) (addressing the issue under the Sentencing Guidelines), cert. denied, 137 S. Ct. 1359 (2017), overruled on other grounds, *United States* v. *Herrold*, No. 14-11317, 2018 WL 948373 (5th Cir. Feb. 20, 2018). The en banc court recognized, however, that "[t]here are powerful arguments on both sides of the question" presented in this case, and it "welcome[d] any additional guidance from th[is] Court" on the issue. *United States* v. *Herrold*, No. 14-11317, 2018 WL 948373, at *14, *18 (5th Cir. Feb. 20, 2018); see *id.* at *22-*26 (Haynes, J., dissenting).

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[*] Respondent suggests (Br. in Opp. 7-8) that the Third and Eleventh Circuits also have held that the burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation cannot constitute generic burglary for purposes of the ACCA. As the government explained in *Stitt*, however, those courts' decisions address statutes reaching nonpermanent or mobile structures adapted for carrying on business as well as for overnight accommodation, and thus do not directly address the question presented here. See Reply Br. at 4 n.1, *Stitt*, *supra* (No. 17-765).

Respondent acknowledges (Br. in Opp. 7, 11) a division of authority, but he attempts to minimize it. First, respondent suggests (*id.* at 9) that the Tenth Circuit's decision in *United States* v. *Spring*, 80 F.3d 1450, 1462, cert. denied, 519 U.S. 963 (1996), "exclusively relied" on a Ninth Circuit decision that was later overruled. But as the government has explained in *Stitt*, *Spring* includes its own analysis, and the Tenth Circuit has applied *Spring*'s holding since the Ninth Circuit's change in position. Reply Br. at 6, *Stitt*, *supra* (No. 17-765). And although *Spring* considered the same statute that the Fifth Circuit recently held overbroad on other grounds in *Herrold*, *supra*, see Br. in Opp. 9, nothing in the Fifth Circuit's decision undermines the Tenth Circuit's analysis on the particular question presented here and in *Stitt*.

Second, respondent suggests (Br. in Opp. 10-11) that even though the Seventh Circuit's decision in *Smith* v. *United States*, 877 F.3d 720 (2017), petition for cert. pending, No. 17-7517 (filed Jan. 17, 2018), "held that burglarizing occupied mobile homes and occupied trailers may constitute generic burglary," the Seventh Circuit nevertheless "did not rule definitively that burglarizing any vehicle or conveyance adapted or used for overnight accommodations constitutes generic burglary." But the Seventh Circuit expressly "agree[d] with the Tenth Circuit * * * and with Judge Sutton's dissenting opinion * * * in *Stitt*." *Id.* at 724. And it rejected the defendants' view that burglary is limited to immovable buildings and structures, because that view contravenes *Taylor* by excluding "almost all states' existing burglary statutes." *Ibid.*

3. Respondent errs in contending (Br. in Opp. 11) that certiorari should be denied on the theory that this

case is "not the appropriate vehicle" for deciding the question presented. As explained in the petition (Pet. 6), the question presented received the fullest consideration in *Stitt*, *supra*, and the government therefore has asked this Court to grant the petition in *Stitt* and hold the petition in this case pending the disposition of *Stitt*. But this case also presents a suitable vehicle, and if the Court wishes to consider the question presented in the context of multiple state statutes, it could grant both petitions and consolidate them for review. Pet. 6.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending the Court's disposition of the petition in *United States* v. *Stitt*, No. 17-765 (filed Nov. 21, 2017), and then be disposed of as appropriate.

Respectfully submitted.

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