No. 17-766

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
JASON DANIEL SIMS,
Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a conviction for residential burglary under Ark. Code Ann. § 5-39-201(a)(1) falls within the generic crime of "burglary" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii).

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BRIEF FOR RESPONDENT

Respondent Jason Daniel Sims respectfully requests that this Court affirm the judgment of the U.S. Court of Appeals for the Eighth Circuit.

INTRODUCTION

The Government fills its brief with talk about "mobile structures" and "mobile homes." But this case is actually about whether the locational element of generic burglary encompasses two distinct types of *vehicles*: (1) those, such as recreational vehicles ("RV's") and campers, that are designed for only occasional overnight use; and (2) automobiles not even designed for such use but in which a person nevertheless happens to live. Arkansas's residential burglary statute covers both of these types of motor vehicles, as well as their marine equivalents. This Court, however, has explained time and again that generic burglary excludes them.

STATEMENT OF THE CASE

A. Legal Background

1. A defendant convicted of being a felon in possession of a firearm is ordinarily subject to a maximum sentence of ten years' imprisonment. 18 U.S.C. §§ 922(g), 924(a)(2). But if the defendant "has three previous convictions . . . for a violent felony or a serious drug offense," 18 U.S.C. § 924(e)(1), "the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life," *Johnson v. United States*, 135 S. Ct. 2551, 2555 (2015). One of the offenses that the ACCA specifically enumerates as a "violent felony" is "burglary." 18 U.S.C. § 924(e)(2)(B)(ii).

In *Taylor v. United States*, 495 U.S. 575 (1990), this Court held that "burglary" for purposes of the ACCA is "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. The Court did not further define the phrase "building or structure. " But it did note specifically that certain state statutes that included "places, such as automobiles and vending machines, other than buildings," extended "more broadly." *Id.* The Court subsequently reiterated that the ACCA "makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), *not in a boat or motor vehicle*." *Shepard v. United States*, 544 U.S. 13, 15-16 (2005) (emphasis added); *see also Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016) (state law broader than generic burglary because it "reache[d] . . . land, water, or air vehicles" (emphasis omitted) (quoting Iowa Code § 702.12 (2013)).

2. To determine whether a particular prior state conviction qualifies as "burglary" under the ACCA, courts apply the "categorical approach." *Taylor*, 495 U.S. at 600. Under that approach, courts compare "the statutory definition" of the state crime of conviction to the "generic" form of burglary referenced in the ACCA. *Id.* at 602. If the definition of the state crime is the same as, or narrower than, "generic" burglary, then the prior offense qualifies as a predicate conviction under the ACCA. *Id.* But if the statute of conviction covers a broader range of conduct than the ACCA definition, the defendant's prior con-

viction does not (as relevant here) qualify as ACCA burglary.[1]

B. Factual and Procedural Background

1. Respondent Jason Daniel Sims pleaded guilty in the U.S. District Court for the Eastern District of Arkansas to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Pet. App. 1a. At sentencing, the Government argued that he should be sentenced under ACCA because he had four prior qualifying felony convictions. Respondent conceded he had two such convictions. But he contended his two prior convictions for Arkansas residential burglary did not constitute "burglary" under the ACCA.

Under Ark. Code Ann. § 5-39-201(a)(1), "[a] person commits residential burglary if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment." *Id.* A "residential occupiable structure" is defined, in turn, as "a *vehicle*, building, or other structure: *(i) In which any person lives; or (ii) That is customarily used for overnight accommodation of a person whether or not a person is actually present.*" Ark. Code

[1] Under what is known as the "modified categorical approach," the Government can attempt to show that a conviction for a state offense that is broader than its generic counterpart nevertheless constitutes a predicate conviction under the ACCA if the elements of the state crime are "divisible" and the jury necessarily found, or the defendant necessarily admitted, the elements of the generic offense. *See Descamps v. United States*, 570 U.S. 254, 263-64 (2013). The Government makes no such claim here. *See* Pet. App. 3a.

Ann. § 5-39-101(4)(A) (2013) (emphasis added).[2] And "vehicle" is defined as "any craft or device designed for the transportation of a person or property across land or water or through the air." *Id.* § 5-39-101(5).

"The district court disagreed with Sims and found his Arkansas residential burglary convictions were ACCA predicate offenses. As a result, Sims's advisory sentencing guidelines range was 188 to 235 months." Pet. App. 3a. The court sentenced him to 210 months (17 and one-half years) imprisonment, followed by three years of supervised release. *Id.*

2. The Eighth Circuit reversed. It observed that this Court has explained numerous times that the locational element of generic burglary does not extend to "boat[s] or motor vehicle[s]." Pet. App. 4a (quoting *Shepard*, 544 U.S. at 15-16) (emphasis removed). Yet under Arkansas law, a person commits residential burglary if he enters certain types of boats or motor vehicles with intent to commit a crime. *Id.* 3a (citing Ark. Code Ann. § 5-39-201(a)(1)). Accordingly, the court of appeals concluded that "Arkansas' residential burglary categorically sweeps more broadly than generic burglary" under the ACCA. *Id.* 6a.

The Eighth Circuit denied the Government's petition for rehearing en banc, and the case was remanded for resentencing. Pet. App. 7a-8a.

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[2] As the Government notes, respondent was convicted under a prior version of the statute, but the minor change in language does not affect the analysis here. *See* U.S. Br. 12 n.1.

SUMMARY OF ARGUMENT

The locational element of the Arkansas residential burglary statute is broader than its generic counterpart in the ACCA for two independent reasons: (i) it encompasses vehicles designed for only occasional overnight use; and (ii) it covers *any* vehicle in which a person happens to live.

I. In *Taylor v. United States*, 495 U.S. 575 (1990), and for nearly thirty years since, this Court has explained that the locational element of residential burglary covers "buildings" and "structures," but not "vehicles." *Id.* at 599; *see also Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016); *Shepard v. United States*, 544 U.S. 13, 15-16 (2005). The first prong of Arkansas's residential burglary statute, however, applies to "vehicles" that are "customarily used for overnight accommodation." Ark. Code Ann. § 5-39-101(4)(A)(ii). This subsection covers not only mobile homes but also RV's, campers, and boats with sleeping quarters. Regardless of whether the Government is correct that mobile homes can be regarded as "buildings" or "structures," the latter collection of objects certainly cannot.

Treating RV's, campers, and their vessel equivalents as outside the scope of generic burglary is also consistent with the purpose of the ACCA. The Act includes burglary among its list of "violent felonies" because it carries a high risk of violent confrontation. Yet, in contrast to homes and other primary residences, RV's, campers, and boats with sleeping quarters are vacant the vast majority of the time. Consequently, entering such a vehicle without au-

thorization is far less likely to result in any kind of personal confrontation.

The Government's principal response is that this Court should redefine generic burglary from scratch. According to the Government, "the empirical grounding and legal backdrop" of *Taylor* actually establish that generic burglary should, in fact, cover vehicles that are "adapted for overnight accommodation." U.S. Br. 33. This argument is irreconcilable with basic principles of *stare decisis*. While this Court is not beholden to every phrase or sentence in prior opinions, it is bound to give precedential effect to prior *holdings*. And the definition of burglary announced in *Taylor* constitutes the holding of the case. Furthermore, it is far from clear that the Government's *de novo* contentions are valid even on their own terms. Especially under these circumstances, and given Congress's longstanding acquiescence to *Taylor*, this Court should adhere to the definition of generic burglary it laid down in that case and has repeated several times since.

II. Even if this Court were to grant the Government's request to reinvent generic burglary from original source materials, the judgment below should still be affirmed. The second prong of the Arkansas residential burglary statute—unlike the Tennessee statute at issue in *United States v. Stitt* (No. 17-765)—covers *any* vehicle "[i]n which any person lives." Ark. Code Ann. § 5-39-101(4)(A)(i). This provision—which covers ordinary cars (for example, a Honda Civic or a Subaru Outback) in which a person happens to live—is unquestionably broader than the locational element of the generic crime.

Only nine states in 1986 had burglary statutes covering ordinary vehicles in which people lived; the vast majority of states defined burglary (as the other prong of Arkansas's statute does) based on the *nature or design* of a vehicle. The Model Penal Code explicitly excludes ordinary motor vehicles in which someone lodges from its scope. The criminal law treatise by Wayne LaFave, on which the Government heavily relies, did so as well. Lastly, the ACCA's purposes require excluding such locations from generic burglary. An individual entering an ordinary motor vehicle would not generally think it a place in which a person lives—and thus would not perceive any genuine risk of a violent altercation.

To be sure, there are no reported cases applying Arkansas's residential burglary statute to an ordinary vehicle in which a person was living. But the fact that the Arkansas statute itself plainly covers such automobiles resolves the categorical approach inquiry. Defendants must produce case law demonstrating the overbreadth of a state law only when their arguments rely on something other than statutory text—say, a common-law principle or the prospect of a court putting a counterintuitive gloss on a provision. Any generally applicable requirement to prove a state law has been applied in a particular manner would pose serious practical and equitable problems. It would also contravene the Sixth Amendment concerns that motivate the categorical approach in the first place.

III. If necessary to affirm, this Court should overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1999), and hold that the ACCA violates the

Sixth Amendment inasmuch as it increases a defendant's statutory sentencing range based on recidivist facts found by a judge instead of a jury. As Justice Thomas has detailed, the *Almendarez-Torres* exception to the rule otherwise requiring juries to find any fact that increases a defendant's sentence contravenes the original understanding of the Sixth Amendment. That constitutional infirmity should no longer be tolerated.

ARGUMENT

The Eighth Circuit correctly determined that the locational element of the Arkansas residential burglary statute encompasses a broader range of conduct than generic burglary. The Arkansas statute covers vehicles such as RV's, campers, and boats designed for occasional overnight accommodation, which cannot be shoehorned into the "building or structure" requirement this Court has established for generic burglary. But even if this Court were to revisit that definition, it would not matter. The Arkansas statute separately extends to *any vehicle at all* in which a person happens to live. There is no plausible argument from first principles or otherwise that generic burglary also extends to such vehicles.

I. ARKANSAS'S RESIDENTIAL BURGLARY STATUTE IS BROADER THAN "GENERIC" BURGLARY BECAUSE IT ENCOMPASSES VEHICLES DESIGNED FOR OCCASIONAL OVERNIGHT ACCOMMODATION.

A. The Locational Element of "Generic" Burglary Excludes Vehicles Designed for Occasional Overnight Use.

In *Taylor v. United States*, 495 U.S. 575 (1990), this Court was "called upon to determine the meaning of the word 'burglary' as it is used in [the ACCA]." *Id.* at 577. The Court "conclude[d] that a person has been convicted of burglary for purposes of [18 U.S.C.] § 924(e) if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, *a building or structure*, with intent to commit a crime." *Id.* at 599 (emphasis added).

Taylor and subsequent cases make clear that a "vehicle" is a distinct category of location from a "building" or "structure," at least when the vehicle is designed for only occasional overnight use. In *Taylor* itself, the Court repeatedly used state burglary statutes that extend to "automobiles" as the paradigmatic example of statutes that reached "more broadly" than generic burglary. 495 U.S. at 591, 599, 602. In *Shepard v. United States*, 544 U.S. 13 (2005), the Court further explained that burglary is generic "only if committed in a building or enclosed space . . . , *not* in a boat or motor vehicle." *Id.* at 15-16 (emphasis added). And in *Mathis v. United States*, 136 S. Ct. 2243, (2016), the Court reaffirmed that generic

burglary applies to "buildings and other structures, but *not* vehicles." *Id.* at 2250 (emphasis added); *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007) ("a car is not a 'building or structure'").

This Court has also made clear the ACCA's drafting history supports this limited definition of burglary. As initially passed in 1984, the ACCA classified an offense as burglary only if it involved an invasion of a "building." *Taylor*, 495 U.S. at 598. Although the 1986 amended statute omitted that definition, the Court explained in *Taylor* that its definition of generic burglary was "practically identical" to it. *Id.* at 598. Indeed, the "legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process." *Id.* at 589-90. "[N]o alternative definition of burglary was ever discussed," and "there simply is no plausible alternative that Congress could have had in mind." *Id.* at 598.

B. The Arkansas Statute Covers Vehicles Designed for Occasional Overnight Use.

1. It is readily apparent that Arkansas's residential burglary statute is broader than the definition of generic burglary laid down in this Court's case law. The locational element of the Arkansas residential burglary statute covers in part any "*vehicle* . . . [t]hat is customarily used for overnight accommodation of a person whether or not a person is actually present." Ark. Code Ann. § 5-39-101(4)(A)(ii) (emphasis added). This provision encompasses RV's and camp-

ers, along with houseboats and other watercraft with overnight sleeping quarters.[3]

Such objects are *vehicles* not only in name but also in function. Black's Law Dictionary defines "vehicle" as "[a]ny conveyance used in transporting passengers or things by land, water, or air." Black's Law Dictionary 1788 (10th ed. 2014). That description encapsulates the basic purpose of RV's, campers, and boats that contain sleeping quarters—namely, to enable transportation of people and things from place to place. Such instruments also allow users to sleep inside them on an occasional overnight basis. But they are not designed for prolonged lodging, much less use as a primary residence.[4] They are designed for movement. Consequently, the Arkansas statute's locational element is

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[3] For an example of such an application, see *Mountain Home Man Arrested on Burglary, Theft Charges*, The Baxter Bulletin (Aug. 26, 2011) (Arkansas residential burglary charge for invasion of unoccupied recreational vehicle). *See also Crime Spree Leads to Total Charges of 24 Felonies*, Springfield News-Leader (May 29, 2014) (Missouri residential burglary charge for invasion of an unoccupied houseboat).

[4] In exempting RVs from its mobile home regulations, the Department of Housing and Urban Development has defined an RV as a vehicle "designed only for recreational use *and not as a primary residence or for permanent occupancy*." Manufactured Home Procedural and Enforcement Regulations; Revision of Exemption for Recreational Vehicles, 81 Fed. Reg. 6806 (proposed Feb. 9, 2016) (to be codified at 24 C.F.R. §§ 3280, 3282) (emphasis added). Indeed, many local zoning ordinances forbid using RV's as a principal place of residence. *See, e.g.*, City of North Little Rock Zoning Ordinance § 12.10D(6)(b) ("No recreational vehicle shall be used as a permanent place of abode . . .").

categorically broader than the corresponding element of generic burglary.

2. The Government tries in two ways to shoehorn the vehicles covered by Arkansas's statute into this Court's definition of burglary. But neither attempt succeeds.

First, the Government embarks on a discussion of "mobile homes," contending that such abodes resemble in all pertinent respects "a colonial-style house" or other "immovable dwelling[]." U.S. Br. 25-26. It does not matter, however, whether the locational element of generic burglary can be stretched to cover mobile homes. The categorical approach requires the Government to show that Arkansas's residential burglary statute, in *all* of its applications, fits within generic burglary. *See, e.g.*, *Mathis*, 136 S. Ct. at 2248. And mobile homes are distinct from RV's, campers, and boats with sleeping quarters.

Mobile homes are living units that are "used as permanent residences" in a stationary manner. William P. McCarty, *Trailers and Trouble? An Examination of Crime in Mobile Home Communities*, Cityscape: A Journal of Policy Development and Research, Vol. 12, No. 2, at 129 (2010). They can be towed. But they are "difficult, if not impossible, to move." *Id.*; *see also State v. Ryun*, 549 S.W.2d 141, 142 (Mo. 1977) ("It is a typical mobile home, detached from the tow vehicle by which it may be moved [and] connected to an electricity transmission line.").

So too with respect to floating homes—the marine equivalent of mobile homes.[5] Like mobile homes, floating homes are designed to be primary residences and cannot function absent land-based utilities. *See Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 122 (2013) (noting that the floating home at issue "had no special capacity to generate or store electricity but could obtain that utility only through ongoing connections with the land"). Floating homes are thus qualitatively different from the types of watercraft that, to win this case, the Government must show fall within generic burglary: modest power boats and sailboats that contain sleeping quarters.

Second, the Government advances various arguments about "mobile structures," perhaps seeking to imply that RV's, campers, and boats with sleeping quarters can be characterized in those terms. *See* U.S. Br. 16-20, 23. But that is surely not how a speaker would refer to them in ordinary English. Nor would an attorney or scholar focused on the specific issue at hand: The criminal law treatise on which the Government repeatedly relies refers to a

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[5] The Government uses the word "houseboat" to describe a floating structure designed to be "a home." U.S. Br. 37. But a houseboat is akin to an RV: It is "a wide and slow-moving power boat propelled by an inboard or outboard engine . . . designed for short-term living and light cruising on inland lakes, rivers, canals, and bays." B. Flanagan, *The Houseboat Book* 20 (2003). The marine equivalent of a mobile home is a floating home, which "differs significantly from an ordinary houseboat in that it has no ability to propel itself" and functions as a primary residence. *Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 122 (2013).

"motor home" (a synonym for an RV) as a "vehicle," not a "mobile structure." 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(c) n.85 (1986).

This Court's precedent likewise distinguishes "structures" from "vehicles." *See supra* at 9-10. Most recently, in *Mathis* this Court assessed an Iowa statute that applied not only to a building or structure but also to certain "vehicles." 136 S. Ct. at 2250. Each of the opinions in the case took as given that the locational element of the statute was overbroad because of its inclusion of vehicles. *See id.* at 2242; *id.* at 2258 (Kennedy, J., concurring); *id.* (Thomas, J., concurring); *id.* at 2260 (Breyer, J., dissenting); *id.* at 2268 (Alito, J., dissenting).

The Government now reimagines *Mathis* as treating the Iowa statute as overbroad because it covered vehicles used only "for storage." U.S. Br. 36 n.3. But there is not one word in any of the four separate opinions in that case that so much as mentions that statutory language. Because generic burglary covers "buildings and other structures, but not vehicles," it was enough that the statute covered "vehicles." *Mathis*, 136 S. Ct. at 2250.

C. This Court Should Decline the Government's Request To Reconstruct a New Definition of Generic Burglary.

Insofar as the Arkansas residential burglary statute reaches more broadly than the "building or structure" definition set forth in *Taylor* and subsequent cases, the Government urges this Court simply to disregard that definition. According to the

Government, "the empirical grounding and legal backdrop" of *Taylor*, as well as its "discussion of the ACCA's design," actually support a more expansive definition than the Court announced. U.S. Br. 24, 33. The Government argues, in other words, that this Court should abrogate the holding of *Taylor* insofar as the underlying methodology used in that case supports a definition of "burglary" that encompasses invasions of the full range of vehicles covered by the Arkansas statute, including RV's and boats with sleeping quarters. The Government's approach misapprehends basic principles of *stare decisis* and is underwhelming even on its own terms.

1. *Taylor*'s Definition of Generic Burglary Is Entitled to *Stare Decisis* Effect.

a. The Government proceeds as if this Court's repeated pronouncements that generic burglary categorically excludes vehicles have been nothing more than the product of loose language. All that is necessary to rule in its favor, the Government suggests, is to read a few isolated "statements" in *Taylor* and subsequent opinions in the limited context in which they were made. U.S. Br. 35.

But *Taylor*'s definition of burglary was neither casually nor carelessly adopted. To the contrary, the passage in which the Court restricted the locational element of generic burglary to "a building or structure" reflects close attention and careful draftsmanship. 495 U.S. at 599. Indeed, the *Taylor* Court had directly before it other terms it could have chosen to define the locational element of burglary—and that might have accommodated the Government's expan-

sive view. For instance, the Model Penal Code expressly defined its locational element to cover "structures" *and* "vehicles" adapted for overnight accommodation. *See* Model Penal Code § 221.0(1) (1980). But the Court chose not to adopt that definition, nor the many others before it, choosing instead to define burglary as certain invasions of a "building or structure." *Taylor*, 495 U.S. at 599; *see also Stitt* Pet. App. 22a (Boggs. J., concurring).

More fundamentally, the Government's view of *stare decisis* is misguided. As the Government notes, "the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." U.S. Br. 33-34 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). But there is a world of difference between mere language in an opinion and *the legal holding* this Court crafts to decide a case. Legal holdings are entitled to *stare decisis* effect. They may not be set aside in a future case simply because a later litigant argues that certain reasoning in the opinion—or even an underlying methodology it purports to apply—actually leads to a different conclusion than the one this Court announced. What is more, "the doctrine of *stare decisis* is most compelling" where, as here, a prior decision addressed a "pure question of statutory construction." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 205 (1991).

Taylor's "building or structure" limitation is plainly part of the decision's legal holding—and thus is entitled to statutory *stare decisis* effect. As the Government itself recognized, the central task in that case was identifying "the proper definition of

the term 'burglary' in the 1986 statute." U.S. Br. *8, *Taylor v. United States*, 495 U.S. 575 (1990) (No. 88-7194), 1989 WL 1126976. And the Court framed the question presented in those terms, explaining it was "called upon to determine the meaning of the word 'burglary' as it is used in [the ACCA]." 495 U.S. at 577. The Court then answered that question. In a sentence beginning "We conclude," the Court enunciated the rule of the case. *See id*. at 599 ("We conclude that a person has been convicted of burglary for purposes of [the ACCA] if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.").

In short, *Taylor* did not merely apply a methodology to determine whether a particular state statute should be regarded as falling within the scope of "generic" burglary. Indeed, because it was "not apparent" which state statute formed the basis of Taylor's prior convictions, the case did not resolve *any* state-statute-specific question. 495 U.S. at 602. Instead, *Taylor* comprehensively defined "burglary" for purposes of the ACCA.

In the decades since *Taylor* was announced, Congress has taken no action to modify this Court's clear limitation of "burglary" to invasions of buildings or structures. The many years of inaction, coupled with this Court's repeated reiterations of *Taylor*'s definition in *Shepard* and *Mathis*, implies congressional acquiescence to this Court's interpretation of the statutory term. *See, e.g.*, *Watson v. United States*, 552 U.S. 74, 82-83 (2007) (deeming a 14-year

period, in which Congress did not attempt to overrule this Court's interpretation of a statute, to be a "long congressional acquiescence" that enhanced the usual precedential force accorded this Court's statutory interpretation decisions).

b. The Government's crabbed view of *Taylor*'s *stare decisis* effect would be particularly destabilizing because of the nature of the ACCA. Every time a new dispute over the scope of the locational element (or any other aspect) of generic burglary were to arise, the Government would have courts and litigants ask not whether the element falls within *Taylor*'s definition, but instead would require them to engage in a 50-state survey of the 1986 burglary statutes and attempt to discern what the "secondary sources" *Taylor* cited have to say on the issue. U.S. Br. 18-24. They would then have to comb through *Taylor*'s "discussion of the ACCA's design" to see whether the concerns expressed there "apply equally" to the conduct covered by the state law. U.S. Br. 24-25.

This is a recipe for endless litigation. The ACCA's interaction with state laws across the country is a complicated matter that is *already* exceptionally taxing on federal courts' resources. As Judge Bybee recently noted for the Ninth Circuit, courts have long "struggled to understand the contours" of ACCA's application to state convictions. *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011). "Indeed, over the past decade, perhaps no other area of law has demanded more of our resources." *Id.*; *see also United States v. Faulls*, 821 F.3d 502, 516 (4th Cir. 2016) (Shedd, J., concurring)

("[W]e are continuously called upon to determine whether past convictions—on a state-by-state basis—qualify as predicate offenses in multiple contexts, including sentencing."); *United States v. Thomas*, 2017 WL 6375741, at *3 n.2 (E.D.N.Y. Dec. 13, 2017) (noting that the categorical approach can be taxing on both courts and litigants because it requires "a legalistic assessment of a vast universe of statutes of conviction that are as varied as the states that enact them"). Against this backdrop, whatever certainty and predictability can be gleaned from this Court's case law should be safeguarded, not scuttled.

2. The Government's Arguments Are Flawed Even on Their Own Terms.

The difficulties that would result from the Government's approach are illustrated by examining how the secondary sources and other guideposts the Government would have courts examine apply to the Arkansas statute in this case. Such an examination shows it is far from clear that the Government's approach leads to the conclusion it espouses.

a. Start with the LaFave treatise that *Taylor* used as its primary source for its buildings-and-structures rule, and which the Government now advances to support its broader buildings-structures-and-at-least-some-vehicles rule. *See* U.S. Br. 22-24. In the sentence *Taylor* quoted, Professor LaFave explained that modern state statutes "typically describe the place as a 'building' or 'structure,' and these terms are often broadly construed." LaFave § 8.13(c). The next sentence of the treatise states: "Some burglary statutes also extend to still other places, such as all or some types of vehicles." *Id.*

The treatise, therefore, clearly explained that any statute covering even "some types of vehicles" was broader than usual. *Id.*

The Government nonetheless insists that LaFave cannot have meant what he said, because the statutes he cited in footnotes as examples of those covering "buildings" and "structures" also covered vehicles used or adapted for overnight accommodation. U.S. Br. 22-23. But even assuming footnotes of a treatise can cancel out its text, a foray into these footnotes reveals nothing more than a muddle. LaFave cited 13 statutes using the terms "building" and "structure" for the locational element of burglary. LaFave § 8.13(c) & nn.81-82. But those statutes offer wide-ranging definitions of those terms—covering everything from all vehicles, *see* Fla. Stat. ch. 810.02(1) (1985), to just those "designed . . . for residential use," *see* Ga. Code Ann. § 16-7-1 (1984). It seems, therefore, that LaFave (or, more likely, his research assistant) simply collected statutes that used the word "building" or "structure," without regard for how the statutes actually defined those terms. Any attempt to read something more into those citations would stretch them beyond their intended purpose.

If LaFave's footnotes demonstrate anything, another one indicates the Eighth Circuit was "right to reject the [Arkansas] statute as broader than generic ACCA burglary." *Stitt* Pet. App. 21a (Boggs, J., concurring). When LaFave focused directly on showing that some state stautes covered "other places" besides buildings and structures—and thus extended beyond typical statutes—he cited a Texas

law encompassing a "vehicle that is adpated for the overnight accommodation of persons." LaFave § 8.13(c) n.85 (citing Tex. Penal Code §§ 30.01, 20.02 (1986)). That language is substantially similar to the "customarily used" prong of Arkansas's statute.

The Model Penal Code does not advance the Government's cause either. Contrary to the Government's representations (U.S. Br. 20-22), *Taylor* did not draw its definition from that Code. *Taylor* merely observed in a footnote that the definition the Court had independently crafted "approximates that adopted by the drafters of the Model Penal Code." 495 U.S. at 598 n.8. This footnote is no more telling than the Court's statement elsewhere in the opinion that the definition it adopted was "practically identical" to a definition using only the term "building." *Id.* at 598.

Finally, the Government propounds the fact that the criminal codes of most states in 1986 treated invasions of "mobile structures" as burglary. *See* U.S. Br. 18-19. But just last Term this Court declared (at the Government's behest) that a multijurisdictional analysis "is not required by the categorical approach." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1571 n.3 (2017). It would be strange to hold that a factor not even essential to the categorical approach requires abandoning a prior holding establishing the generic definition of a crime—especially given that the Government itself concedes that convictions under almost half of the state laws it cites do not qualify as ACCA burglary, *see* Reply In Support of Certiorari, No. 17-765, at 7-8; U.S. Br. 18 & Appx. B, and that other states with laws *Taylor* ren-

ders overbroad have additional statues that fit within its definition of generic burglary, *see, e.g.*, Tenn. Code Ann. § 39-14-402(a)(1)-(3) (divisible provisions within separate "burglary" statute limited to "building[s]").

b. Exempting RV's, campers, and their marine equivalents from the locational element of generic burglary does not frustrate—but rather comports with—the ACCA's design.

Congress's aim in passing the ACCA was to "capture all offenses of a *certain level of seriousness* that involve violence or an inherent risk thereof." *Taylor*, 495 U.S. at 590 (emphasis added). And as the Government recognizes, burglary was included as a "violent felony" because of "its inherent potential for harm to persons." *Id*. at 588; *see* U.S. Br. 25. A person who "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." *Taylor*, 495 U.S. at 588; *see James v. United States*, 550 U.S. 192, 203 (2007) (Congress was concerned with "the possibility of a face-to-face confrontation between the burglar and a third party").

The Government may be right (*see* U.S. Br. 25-26) that invading a mobile home carries a "level of seriousness," *Taylor*, 495 U.S. at 590, comparable to invading a single-family home. Both are typically used as a person's primary residence. *See supra* at 12. People spend most every night in their primary residences—whether they be houses, apartments, or mobile homes—and someone is likely home a good part of the day in such dwellings as well.

But vehicles such as RV's, campers, and boats with sleeping quarters present very different circumstances. Although such objects are adapted for overnight accommodation, they typically sit empty in driveways, parking lots, and marinas. In fact, RV's are occupied on average only *19 days* out of the year, or 5.2% of the time. *See* Richard T. Curtin, *The RV Consumer*, University of Michigan Survey Research Center 31 (2001).[6] The most common reason RV owners later sell the vehicles is that "they did not use it enough to justify its costs." *Id* at 9.

These phenomena are even more pronounced in the marine context. Even relatively humble sailboats and powerboats can have sleeping quarters. Yet many owners never actually use the boats for overnight accommodation; all too often the vessels sit vacant in the harbor. The odds of a violent confrontation respecting such a boat are accordingly exceptionally low. In fact, an invasion of a boat docked in a marina (or an RV parked on the street) is much more like an ordinary theft of property or trespass offense than burglarizing a home, and neither of the former offenses are enumerated ACCA predicates.

The Government protests that all of the types of invasions the Arkansas statute covers "lie at the heart of the crime of burglary." U.S. Br. 31 (internal quotation marks and citation omitted). But one of the cases it cites—*Smith v. United States*, 877 F.3d 720 (7th Cir. 2017)—shows that just the opposite is true. The Illinois statute deemed in that case to fall

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[6] https://data.sca.isr.umich.edu/fetchdoc.php?docid=25919 (last visited August 14, 2018).

within generic burglary covers "mobile homes" and "trailers"—the types of objects that could plausibly be regarded as "structures" because they are typically used as primary residences and sit still in a permanent location. *Smith*, 877 F.3d at 723 (quoting in part 720 ILCS 5/2-6(b) (1982)). But the statute does *not* encompass the types of vehicles also at issue here—"vehicle[s] . . . intended for use as a human habitation." *Id*. at 722 (quoting (720 ILCS 5/2-6(a)).

This Court should likewise adhere to the distinction in its prior cases between objects that are fundamentally homes and those that are fundamentally vehicles and reject the Government's attempt to treat distinctly different conduct as equivalent for purposes of the ACCA's enhancement.

c. If any lingering doubt remains, the rule of lenity dictates adhering to the rule *Taylor* announced and excluding from generic burglary at least those vehicles that are not typically used as a primary residence. The "time-honored interpretive guideline" of lenity "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990). That rule applies equally to the construction of sentencing statutes. *See, e.g.*, *United States v. Granderson*, 511 U.S. 39, 54 (1994) (the government's proffered interpretation must be "unambiguously correct"); *Busic v. United States*, 446 U.S. 398, 406-07 (1980) ("a clear and definite legislative directive" is necessary); *Bell v. United States*, 349 U.S. 81, 84 (1955) ("Congress [must] fix the punishment for a federal offense clearly and without ambiguity").

When this Court determines the meaning of a statute, that constitutes "an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994). Accordingly, since 1990, the public has been on notice only that convictions under state statutes that extend to "buildings" or "structures" may qualify as "generic burglary" under the ACCA. In light of this Court's prior pronouncements, and the history and purpose of the statute, there is at least an ambiguity over whether vehicles such as RV's are included within the meaning of burglary in the federal statute, and that ambiguity should be resolved in respondent's favor.

II. THE ARKANSAS STATUTE IS OVERBROAD EVEN UNDER THE GOVERNMENT'S PROPOSED METHODOLOGY BECAUSE IT ALSO COVERS VEHICLES NOT ADAPTED FOR LODGING AT ALL.

Even if this Court accepted the Government's proposal to rerun *Taylor*'s underlying analysis, the Arkansas residential burglary statute would still not fall within the scope of generic ACCA burglary. The question presented is whether vehicles "adapted *or used* for overnight accommodation" fall within generic burglary. U.S. Br. I (emphasis added). Yet the Government fails separately to address this aspect of the Arkansas statute's locational element, which extends to vehicles that are *not* adapted or customarily used for overnight use but in which a person *nevertheless happens to live*. Such vehicles are indisputably beyond the reach of generic burglary.

A. The Arkansas Statute Encompasses Vehicles Not Customarily Used For Overnight Accommodation, But in Which a Person Happens to Live.

Despite the Government's effort to lump the statutes together, *see, e.g.*, U.S. Br. 31, the Arkansas statute is broader than the Tennessee statute at issue in *Stitt*, and others akin to the Model Penal Code. Similar to those statutes, one prong of the Arkansas statute covers any vehicle "[t]hat is customarily used for overnight accommodation of a person." Ark. Code Ann. § 5-39-101(4)(A)(ii). But another prong of the Arkansas statute, in a separately numbered subsection, also covers any vehicle "[i]n which any person lives." Ark. Code Ann. § 5-39-101(4)(A)(i). That subsection, which the Government recites (U.S. Br. 32) but then ignores in its analysis, covers vehicles that are *not* adapted or customarily used for overnight accommodation but in which a person nevertheless happens to live. On its face, then, the text of the Arkansas statute covers not just RV's and the like, but also any vehicle of any kind in which a person happens to live—say, a Honda Civic or a Subaru Outback.

B. Ordinary Vehicles in Which Someone Happens to Live Do Not Fall Within the Locational Element of Generic Burglary.

The Government does not dispute that an ordinary motor vehicle falls outside the scope of "generic" burglary's locational element. *See* U.S. Br. 21, 24, 34. Nor could it. As this Court has noted on numerous occasions, an ordinary motor vehicle is different from a "building" or "structure." *See supra* at 9-10

(recounting authority). And even employing the methodology that the Government urges this Court to undertake to redefine generic burglary, there is no plausible argument that the crime extends to any vehicle in which a person happens to live.

1. *Multijurisdictional analysis.* Looking to the way the term "burglary" was used in "most states" in 1986, there were at most nine states, including Arkansas, with burglary statutes that similarly extended to any motor vehicle depending on whether someone lived there or used it for lodging.[7] That is, the vast majority of the statutes the Government cites focused on the nature and design of a vehicle, not, like the Arkansas statute, on how the vehicle is *actually used*. And those statutes covered only those vehicles designed for overnight accommodation.

2. *Secondary sources.* The Model Penal Code explicitly excludes ordinary cars used for habitation from the scope of burglary, covering instead only vehicles "*adapted* for overnight accommodation." Model Penal Code § 221.0 (1980) (emphasis added). The Code's commentary states that this limitation "serves to exclude from burglary intrusions into freight cars, motor vehicles other than home trailers or mobile offices, ordinary small watercraft, and the like," even though "a person *could* sleep or conduct

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[7] *See* Ala. Code §§ 13A-7-6; 13A-7-1 (1983); Haw. Rev. Stat. Ann. §§ 708-811; 708-800 (1985); Ky. Rev. Stat. Ann. §§ 511.020; 511.010 (1985); Mo. Ann. Stat. §§ 569.170; 569.010 (1984); N.Y. Penal Law §§ 140.20; 140.00 (1986); N.D. Cent. Code Ann. §§ 12.1-22-02; 12.1-22-06 (1985); Ohio Rev. Code Ann. §§ 2911.12(A); 2909.01(C) (1985); S.C. Code Ann. §§ 16-11-313; 16-11-310 (1985).

business in such a place." Model Penal Code § 221.1 cmt. (3)(b).

The commentary also ties this limitation to the theoretical underpinnings of burglary. The "essential notion" animating burglary, the commentary explains, is to punish invasions of locations with an "apparent potential for regular occupancy." Model Penal Code § 221.1 cmt. (3)(b). That being so, the fact that an ordinary motor vehicle or watercraft is actually being used for habitation is irrelevant. *Id.* Such places are "not the sorts of facilities that ordinarily would put an intruder on notice that they may be in use for such purposes." *Id.*[8]

The LaFave treatise is in accord. Even if the Government were correct that the treatise is best read to suggest that states typically included vehicles adapted for overnight accommodation in their burglary statutes, the treatise contains no indication whatsoever that a statute that reaches *beyond* vehicles adapted for overnight accommodation is (to borrow the Government's word) "typical," U.S. Br. 23. Only one of the 13 statutes (Missouri's) LaFave cited as examples of statutes extending to buildings or structures covered a location based on how it was actually used. *See* LaFave § 8.13(c) & nn.81-82.

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[8] The common law also recognized that the penalties of burglary do not turn on a location's actual use. Discussing why invasion of a tent in a marketplace would not be a burglary even "though the owner may lodge therein," Blackstone explained that "his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances." 4 William Blackstone, Commentaries on the Laws of England *226 (1769).

3. *ACCA's design.* The ACCA's design also supports a locational element for "burglary" that "focus[es] on the nature of the property or place, not on the nature of its use at the time of the crime." *United States v. Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010). The essential purpose of the ACCA's burglary classification is to identify dangerous career criminals—those who repeatedly invade locations with knowledge (or at least fair notice) that there is an inherently strong potential for harm to other persons. *See supra* at 22. As *Taylor* put it, "the offender's own awareness of" the possibility of violent confrontation indicates that "he is prepared to use violence if necessary to carry out his plans or to escape." *Taylor v. United States*, 495 U.S. 575, 588 (1990).

All an individual can be reasonably aware of in advance of invading an automobile is the vehicle's appearance and intended use. If, therefore, an individual targets an ordinary motor vehicle, he would not expect it to be a place in which a person lives. Congress would not have thought that a person who was previously convicted of violating a statute covering an ordinary motor vehicle is as dangerous (or as deserving of enhanced punishment) as an individual who previously invaded a single-family dwelling (or even a mobile home).

C. The Facial Overbreadth of the Arkansas Statute Dictates that Respondent's Convictions Are Not For ACCA "Burglary."

No Arkansas court appears to have published an opinion dealing with burglary in the context of an ordinary car in which someone happens to live. But

that is of no moment. Because the plain text of Arkansas's statute covers such conduct, reaching far beyond the locational element of generic burglary, respondent's convictions under that statute cannot qualify as "violent felonies" under the ACCA.

1. This Court's precedent establishes that where "the elements of [the defendant's] crime of conviction . . . cover a greater swath of conduct than the elements of the relevant [generic] offense," that disparity "resolves th[e] case." *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). There is no need to look beyond the plain-text comparison. *See id.* (holding that state statute was overbroad based solely on textual comparison); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (same; petitioner "needs no more to prevail"); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1988-90 (2015) (same); *Descamps v. United States*, 570 U.S. 254, 264-65 (2013) (same).

Mellouli is particularly informative. There, this Court considered whether a conviction under a Kansas statute was categorically a conviction "relating to a controlled substance (as defined in [federal law])." 135 S. Ct. at 1984. The state statute expressly encompassed several non-federally-controlled substances. Endorsing the reasoning of the decision below, however, the Government argued that the state statute was not actually broader than the generic offense because the petitioner could identify "no Kansas paraphernalia prosecutions involving non-federally-controlled substances." U.S. Br. 39-40 n.6, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (No. 13-1034). In the Government's view, therefore, "there [was] little more than a 'theoretical possibility' that a

conviction under Kansas law will *not* involve a controlled substance as defined [under the generic offense]." *Id.* (quoting *Mellouli v. Holder*, 719 F.3d 995, 997 (8th Cir. 2013)).

This Court was unmoved. Observing that the text of the state law "was not confined to federally controlled substances," the Court held that the law was broader than its generic counterpart. *Mellouli*, 135 S. Ct. at 1988. The categorical approach did not allow the Government to "reach[] state-court convictions . . . in which no controlled substance as defined [in the federal code] figure[d] as an element of the offense." *Id.* at 1990 (internal quotation marks omitted).

While certain aspects of the categorical approach are unusual—even controversial—this plain-text methodology comports with this Court's broader jurisprudence, in which the plain meaning of statutes controls. In *United States v. Stevens*, 559 U.S. 460 (2010), for example, a federal statute criminalized any depiction "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." *Id.* at 465 (quoting 18 U.S.C. § 48(c)). The defendant claimed that the statute violated the First Amendment's overbreadth doctrine because it encompassed hunting magazines and other protected speech. The First Amendment's overbreadth doctrine requires a showing even more demanding than the categorical approach—namely, that "a substantial number of [the challenged statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 473 (quoting *Wash. State Grange v. Wash. State Republican Par-*

ty, 552 U.S. 442, 449 n.6 (2008)). But the Court deemed immaterial the Government's representation that it "neither has brought nor will bring a prosecution" based on any protected speech. *Id.* at 480 (quoting Government's reply brief). It was enough that a "natural reading" of the statute encompassed such speech. *Id.* at 480-81.

2. There is no doubt that the plain meaning of Arkansas's residential burglary statute is facially broader than the locational element of generic burglary. Arkansas courts employ customary tools of statutory construction, including the rule that when "the plain language of the statute . . . is clear and unambiguous . . . the plain meaning of the words" governs. *Nat'l Home Centers, Inc. v. Coleman*, 283 S.W.3d 218, 222 (Ark. 2008). The Arkansas Supreme Court also follows the rule that statutes should be construed "so that no word is left void, superfluous, or insignificant," and thus "gives meaning and effect to every word in the statute, if possible." *Holbrook v. Healthport, Inc.*, 432 S.W.3d 593, 597 (Ark. 2014) (citations omitted).

These principles confirm beyond dispute that Ark. Code Ann. § 5-39-101(4)(A)(i) encompasses any vehicle of any type in which a person happens to live. That subsection covers "a vehicle . . . [i]n which any person lives." It places no limit on the type of "vehicle" that will suffice, and "vehicle" is separately defined broadly as "any craft or device designed for the transportation of a person or property across land or water or through the air." *Id.* § 5-39-101(5). The only qualifier is that a person be living in the vehicle. And the original Arkansas Commentary to § 5-39-

101 underscores that "[v]ehicles and boats are included" in the statute's ambit "if persons live (whether permanently or temporarily) . . . therein."[9]

That plain-text reading is reinforced by the rule against superfluity. The Arkansas statute covers any vehicle "(i) [i]n which any person lives; *or* (ii) [t]hat is customarily used for overnight accommodation of a person." Ark. Code Ann § 5-39-101(4)(A) (emphasis added). Given the disjunctive "or," the first and second subsections must have "separate meanings." *United States v. Woods*, 571 U.S. 31, 45 (2013) (quoting *Reiter v. Sonotone Corp.* 442 U.S. 330, 339 (1979)). And the only way to give the first subsection such independent force is to honor its plain language, which applies to *any* vehicle in which someone *actually* lives, even if it is a type of vehicle not customarily used for that purpose.

Indeed, the Sixth Circuit has recognized that similar language in Kentucky's burglary statute is necessarily broader than a statute that covers only vehicles "adapted for [overnight] accommodation." *United States v. Brumback*, 614 F. App'x 288, 292 (6th Cir. 2015). In that case, the court went on to hold that even if generic burglary covers a vehicle or boat adapted for overnight accommodation, it does not extend to any vehicle "[w]here any person lives." *Id.* So too here: The facial overbreadth of Arkansas's

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[9] https://archive.org/search.php?query=arkansas%20code%20commentaries; *see State v. Reeves*, 574 S.W.2d 647, 649 (Ark. 1978) (Arkansas legislative commentary is authoritative unless a court is "clearly convinced that it is erroneous or that it is contrary to the settled policy of this state, as declared in opinions of [the Arkansas Supreme Court]").

any-vehicle-in-which-a-person-lives provision independently renders the burglary statute categorically broader than its generic counterpart.

3. This Court held in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), that when a party arguing that a state law is overbroad bases his argument on something other than statutory language (there, the prospect that a state court would apply an aspect of the aiding and abetting doctrine in an unusually broad manner), he must show a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* at 193. To make that showing, the party must identify "cases in which the state courts" have actually applied state law in a nongeneric manner. *Id.* Mere resort to "legal imagination" will not do. *Id.*

But as the vast majority of the courts of appeals to have considered the question have held, *Duenas-Alvarez* does not apply where, as here, a state statute of conviction *itself* is facially broader than the "generic" federal crime at issue. Where "a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (citation omitted); *accord Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017)*; Hylton v. Sessions*, ___ F.3d ___, 2018 WL 3483561, at *6 (2d Cir. July 20, 2018); *Singh v. U.S. Att'y Gen.*, 839 F.3d 273, 286

n.10 (3d Cir. 2016); *United States v. Henriquez*, 757 F.3d 144 (4th Cir. 2014); *Mendieta-Robles v. Gonzales*, 226 F. App'x 564, 572 (6th Cir. 2007); *Vassell v. U.S. Att'y Gen.*, 839 F.3d 1352, 1362 (11th Cir. 2016); *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013); *but see Vasquez v. Sessions*, 885 F.3d 862, 872-74 (5th Cir. 2018), *cert. denied,* 138 S. Ct. 2697 (2018).[10]

Here, no Arkansas decision remotely suggests that its burglary statute does not mean what it says: The locational element of respondent's convictions includes any "vehicle . . . [i]n which any person lives." Ark. Code Ann. § 5-39-101(4)(A)(i). And the possibility that an individual would invade a motor vehicle in which another person lives is hardly a speculative machination. It is an unfortunate reality in America (as numerous studies and news reports confirm) that many people do in fact live in ordinary motor vehicles, either temporarily or permanently. *E.g.*, Ian Urbina, *Keeping It Secret as the Family Car Becomes a Home*, NY Times (Apr. 2, 2006). Even though such people typically spend their days away from their vehicles, they sleep sitting up in ordinary

[10] In its brief in opposition in *Vasquez*, the Government distinguished the Fifth Circuit's decision from most others that have held *Duenas-Alvarez* inapplicable under the circumstances here. The Government contended that special features of immigration law and the state law at issue there supported the Fifth Circuit's decision. *See* Br. in Opp. 18-19, *Vasquez v. Sessions*, 138 S. Ct. 2697 (2018) (No. 17-1304).

car seats. If questioned, they often "tell the police that they were just napping." *Id.*[11]

Perhaps the text of Arkansas's statute is so clear that no defendant prosecuted for burglarizing an ordinary car in which someone was living has bothered to dispute that the law covers such conduct. Or perhaps some such prosecutions in which the issue was raised have resulted in plea bargains with waivers of the right to appeal. Whatever the reason for the absence of any reported decision on the issue, the text of Arkansas's residential burglary statute speaks for itself. Any attempt to apply a reported-case requirement here would "wrench[] the Supreme Court's language in *Duenas-Alvarez* from its context." *Hylton*, 2018 WL 3483561, at *6 (internal quotation omitted).

3. Lest there be any doubt, conducting the categorical inquiry against the plain text of Arkansas's statute is essential here for at least two reasons.

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[11] *See also* Yolanda Putman, *A car to call home: Surprising number of homeless live in their vehicles, experts say*, Chattanooga Times Free Press (July 7, 2014), https://goo.gl/285J3G; Kevin O'Leary, *Last Refuge for the Homeless: Living in the Car*, TIME (Feb. 12, 2010), https://goo.gl/7AdgCr; *Homeless families living in cars*, 60 Minutes (Nov. 22, 2011), https://goo.gl/wjerLX; Darcy Spencer, *D.C. Woman Prefers Living in Car to Homeless Shelters*, NBC Washington (July 16, 2014), https://goo.gl/pgWuYP; Vianna Davila, *Seattle still doesn't know what to do with thousands of people living in vehicles*, Seattle Times (Apr. 10, 2018), https://goo.gl/JFBU8K; Antonio Olivo, *In a wealthy Virginia suburb, their cars are their beds*, Wash. Post (Oct. 3, 2016), https://goo.gl/5z5XAs; Zusha Elinson, *Homeless Lose a Longtime Last Resort: Living in a Car*, Wall Street Journal (Apr. 8, 2014), https://goo.gl/iJfQ2G.

a. A plain-text comparison is necessary to ensure the categorical approach promotes "efficiency, fairness, and predictability." *Mellouli*, 135 S. Ct. at 1987. The categorical approach advances those values "by precluding the relitigation of past convictions in minitrials conducted long after the fact." *Moncrieffe v. Holder*, 569 U.S. 184, 200-01 (2013); *see also Taylor*, 495 U.S. at 601 (categorial approach is designed to avoid "practical difficulties and potential unfairness"). This Court, therefore, has consistently rejected conceptions of the categorical approach that would require sentencing courts, "[i]n case after case, . . . to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Descamps*, 570 U.S. at 270.

Even greater difficulties would arise if defendants claiming the overbreadth of state statutes were always required to make showings—and sentencing courts make findings—regarding the facts of *other individuals' past convictions*. To begin, some "ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Such cases rarely, if ever, generate reported decisions concerning the scope of substantive criminal law. Nor do the vast majority of other convictions—either because there is never an appeal (perhaps because the defendant sees nothing to be gained from challenging the plain language of the statute) or the state courts decline to write an opinion. As a result, a "lack of published cases or appel-

late-level cases does not imply a lack of convictions." *Nunez v. Holder*, 594 F.3d 1124, 1137 n.10 (9th Cir. 2010); *see also Whyte v. Lynch*, 807 F.3d 463, 469 (1st Cir. 2015) ("[W]hile finding a case on point can be telling, not finding a case on point is much less so.").

Nor is it feasible in the vast majority of states to search for records of state indictments or conviction records. Many such records are not maintained at all. *See* Peter M. Brien, Bureau of Justice Statistics, U.S. Dep't of Justice, *Improving Access to and Integrity of Criminal History Records* 9 (2005) (discussing the "extensive problem" of state criminal record databases lacking information regarding disposition). And for those that are, it is often practically impossible to search for such records. For many states, Westlaw does not provide access to any state criminal records. For others, coverage is often limited to specific counties—for example, Westlaw maintains criminal docket materials for only 2 of 105 counties in Kansas. *See* Thomson Reuters, *Court Dockets and Court Wire Coverage*.[12] Even then, criminal indictments and other records will often simply parrot the elements of the statute. *See Mathis*, 136 S. Ct. at 2257 n.7.

That leaves mere word of mouth. Public defenders and other criminal defense lawyers sometimes (but not always) have limited networks at their disposal. But even when they do, it is extremely difficult to ascertain whether a state has applied a crim-

[12] https://legalsolutions.thomsonreuters.com/law-products/solutions/courtwire-dockets/map.

inal statute in any particular manner. Several years of a defendant's liberty should not hang on the random feedback a listserv inquiry may generate. All the more so where—as is often the case under the ACCA—the defense lawyer (and the prosecutor and judge) would need to make such inquiries respecting a far-flung state, with laws and practices that might be totally foreign from the one in which the current proceeding is taking place.

As if all of these complications and inequities were not already bad enough, they would be even more glaring in immigration cases (in which the categorical approach likewise applies, *see Mathis*, 136 S. Ct. at 2551 n.2). Noncitizens must often litigate categorical-approach issues without counsel, while detained, and without even a proficiency in English. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 16 (2015) (37% of noncitizens—and only 14% of detained noncitizens—secure legal representation in removal proceedings); Dep't of Justice, Executive Office for Immigration Review FY 2016 Statistics Sourcebook E1 (only 10% of noncitizens are able to proceed in English in removal proceedings).[13] The notion that such detainees in such cases could be reasonably expected to do anything more than read the state statute of conviction and show that it is broader than its generic counterpart is fanciful in the extreme.

b. The Sixth Amendment concerns underlying the categorical approach also require fidelity to the

[13] https://www.justice.gov/eoir/page/file/fysb16/download.

plain text of state statutes. The Sixth Amendment's jury-trial guarantee forbids imposing punishment based on facts that a prior jury did not "necessarily" find. *Shepard v. United States*, 544 U.S. 13, 14 (2005); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000). And a jury verdict (or a guilty plea) establishes nothing beyond the defendant's past commission of the elements of the charged offense. *Shepard*, 544 U.S. at 14. Accordingly, the question under the categorical approach is whether the *elements* of the prior offense are the same as or narrower than the elements of the generic offense. *Descamps*, 570 U.S. at 257.

The place to look for the answer to that question is "the statutory definitions" of the prior offense. *Descamps*, 570 U.S. at 261 (quoting *Taylor*, 495 U.S. at 600). The statutory elements determine what a jury must have necessarily agreed upon (or a defendant must necessarily have pleaded guilty to) "*as a legal matter*." *Mathis*, 136 S. Ct. at 2255 n.6; *see also Descamps*, 570 U.S. at 261.

The upshot is this: When the plain text of a state crime defines an element more expansively than its generic counterpart, it is irrelevant under the categorical approach whether there is proof that the state statute has been applied in an overbroad manner. Imagine, for example, that a state "burglary" statute applied to a "building or vehicle." Even if there were no evidence that any person had ever been charged for burglarizing a vehicle in that state, there would be no Sixth-Amendment-compliant way to know whether a jury convicting under that statute

necessarily agreed as a legal matter that a home was burglarized rather than a vehicle.

That is essentially what happened in *Mathis*. The parties and this Court there agreed that the Iowa burglary statute "covers more conduct than generic burglary does" because on its face it extended to any "land, water, or air vehicle." *Mathis*, 136 S. Ct. at 2250. Neither party, nor this Court, attempted to demonstrate whether anyone had ever been charged in Iowa for burglary for breaking into a car, boat, or airplane. It was simply taken as given that the statute was overbroad *because the plain text of the statute was overbroad*.

The same is true here. The plain text of the Arkansas residential burglary statute defines the locational element of the crime as including any vehicle "[i]n which any person lives." Ark. Code Ann. § 5-39-101(4)(A)(i). There is simply no way to know from the bare fact of a conviction under this indivisible burglary statute whether someone was convicted of invading a vehicle "customarily used for overnight accommodation," because the statute explicitly lists as an alternative a vehicle "in which any person lives." In light of that reality, the categorical approach demands affirmance of the decision below.

III. THE ACCA'S ENHANCEMENT SCHEME VIOLATES THE SIXTH AMENDMENT.

Justice Thomas has taken the Sixth Amendment concerns that the ACCA presents a step farther and suggested that, "in an appropriate case," this Court should hold that the Act is unconstitutional whenever, as here, it exposes a defendant to a higher sen-

tence based on the fact of his prior convictions. *Shepard v. United States*, 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in the judgment). To be sure, a bare majority of this Court held in *Almendarez-Torres v. United States*, 523 U.S. 224 (1999), that the Sixth Amendment's jury-trial guarantee leaves an exception for such recidivist facts, allowing judges to find them by a preponderance of the evidence. But that holding has "no historical basis." *Apprendi v. New Jersey*, 530 U.S. 466, 521 (2000) (Thomas, J., concurring).

To the contrary, "[c]ases from the founding to roughly the end of the Civil War"—and then for another several decades after that—established that *any* fact, "including recidivism," that exposes the defendant to a higher sentence must be proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 501-02; *see also id.* at 502-18 (cataloging case law); *Almendarez-Torres*, 523 U.S. at 256-57 (Scalia, J., dissenting) (same). This rule was confirmed in Justice Story's *Commentaries on the Constitution* and numerous other treatises, including Bishop's "leading" treatise on the criminal law. *See Apprendi*, 530 U.S. at 500, 510 (Thomas, J., concurring) (citing 1 J. Bishop, Law of Criminal Procedure 50 (2d ed. 1872)). *Almendarez-Torres*, in short, constituted a "sharp break with the past"—one that flouts the "original meaning" of the Sixth Amendment. *Apprendi*, 530 U.S. at 518 (Thomas, J., concurring).

Five years ago, this Court confronted a prior decision that—like *Almendarez-Torres*—had created an ahistorical exception to the Sixth Amendment's jury-trial guarantee, enabling judges to find facts that in-

creased defendant's minimum (as opposed to maximum) sentences. "Because [the previous decision was] irreconcilable with the reasoning of *Apprendi* and the original meaning of the Sixth Amendment, [the Court] follow[ed] the latter." *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013), *overruling Harris v. United States*, 536 U.S. 545 (2002). For all of the reasons Justice Thomas has already detailed, this Court should follow the same course here if necessary to affirm the decision below. *See Shepard*, 544 U.S. at 26-28 (Thomas, J., concurring in part and concurring in the judgment); *Apprendi*, 530 U.S. at 499-523 (Thomas, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

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