IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2017

No.

MICHAEL SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED FOR REVIEW

This Court has held that burglary of a vehicle is not generic burglary within the meaning of the Armed Career Criminal Act, since vehicles are not buildings. Does this statement of general principle allow generic burglary status when the vehicle is a dwelling place?

(The government has filed two certiorari petitions, currently pending, on this issue, for which it was on the losing side in the Sixth and Eighth Circuits. *United States v. Stitt*, No. 17-765; *United States v. Sims*, No. 17-766. This Court has another pending petition that raises the same issue, but from the defense perspective. *Klikno v. United States*, No. 17-5018.)

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Petitioner Michael Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit denying relief is reported at *Smith v. United States*, 877 F.3d 720 (7th Cir. 2017), and is reprinted in the appendix to this petition. A. 1. The district court's opinion is found at *Smith v. United States*, 2017 WL 1321110 (N.D. Ill. Apr. 3, 2017), and is reprinted in the appendix. A. 5.

JURISDICTION

Smith sought post-conviction relief under 28 U.S.C. § 2255. The district court denied relief. *Smith v. United States*, 2017 WL 1321110 (N.D. Ill. Apr. 3, 2017). Smith entered a timely appeal. The Court of Appeals affirmed on December 13, 2017. *Smith v. United States*, 877 F.3d 720 (7th Cir. 2017). Smith filed no

petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 924(e)

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

(2) As used in this subsection—

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

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

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

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

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

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

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

720 ILCS 5/19–1(a)

(a) A person commits burglary when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle as defined in The Illinois Vehicle Code, railroad car, or any part thereof, with intent to commit therein a felony or theft. This offense shall not include the offenses set out in Section 4–102 of The Illinois Vehicle Code, nor the offense of residential burglary as defined in Section 19–3 hereof.

720 ILCS 5/19–3(a)

(a) 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.

720 ILCS 5/2-6(b)

(b) For the purposes of Section 19-3 of this Code, "dwelling" means 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.

625 ILCS 5/1-209

Trailer. Every vehicle without motive power in operation, other than a pole trailer, designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle.

625 ILCS 5/1–217

Vehicle. Every device, in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power, devices used exclusively upon stationary rails or tracks and snowmobiles as defined in the Snowmobile Registration and Safety Act.

For the purposes of this Code, unless otherwise prescribed, a device shall be considered to be a vehicle until such time it either comes within the definition of a junk vehicle, as defined under this Code, or a junking certificate is issued for it.

For this Code, vehicles are divided into 2 divisions:

First Division: Those motor vehicles which are designed for the carrying of not more than 10 persons.

Second Division: Those vehicles which are designed for carrying more than 10 persons, those designed or used for living quarters and those vehicles which are designed for pulling or carrying property, freight or cargo, those motor vehicles of the First Division remodelled for use and used as motor vehicles of the Second Division, and those motor vehicles of the First Division used and registered as school buses.

STATEMENT OF THE CASE

LEGAL BACKGROUND

Under 18 U.S.C. § 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm after a previous felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions . . . for a violent felony or a serious drug offense." ACCA defines a "violent felony" to include any crime punishable by more than one year that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. § 924(e)(2)(B)(ii). ACCA includes alternative definitions of violent felony under its "force" clause and under its "residual" clause.

Although ACCA does not define "burglary," this Court in *Taylor v. United States*, 495 U.S. 575 (1990), construed the term to include "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. Although *Taylor* did not give extended attention to the phrase "building or structure," it excluded vehicles from that phrase. *Id*. at 590-92, 599, 602.

Taylor also instructed courts to employ a "categorical approach" to determine whether a prior conviction meets the definition of generic burglary. 495 U.S. at 600. Under that approach, courts examine "the statutory definition[]" of the previous crime in order to determine whether the jury's finding of guilt, or the defendant's plea, necessarily reflects conduct that constitutes the "generic" form of burglary referenced in ACCA. *Id*. If the statute of conviction consists of elements that are the same as, or narrower than, generic burglary, the prior offense categorically qualifies as a predicate conviction under ACCA. But if the statute of conviction is broader than the ACCA definition, the defendant's prior conviction does not qualify as ACCA burglary unless (1) the statute is "divisible" into multiple crimes with different elements, and (2) the government can show (using a limited set of record documents) that the jury necessarily found,

or the defendant necessarily admitted, the elements of generic burglary. See *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016); *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013); *Shepard v. United States*, 544 U.S. 13, 26 (2005).

FACTUAL BACKGROUND

Smith was charged with a single count of possession of a firearm by a felon. He pleaded guilty to the charge and was sentenced as an armed career criminal to 180 months in prison. The district court relied on two Illinois aggravated battery convictions and two Illinois residential burglary convictions. Smith committed the first residential burglary in 1997; the second, in 1999. A.5.

Smith filed a motion for relief under 28 U.S.C. § 2255. He alleged that after *Johnson v. United States,* 135 S. Ct. 2551 (2015), ACCA's residual clause could not justify his residential burglary convictions as ACCA predicates. That development opened the question of whether Illinois residential burglary is generic burglary as defined in *Taylor*. The government agreed

that his motion was timely, A. 6, but opposed his motion on the merits.

Although the Seventh Circuit had previously treated Illinois burglary as generic burglary, *Dawkins v. United States*, 809 F.3d 953 (7th Cir. 2016), it ruled that after *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Illinois general burglary statute could no longer be considered generic, since it includes vehicles as places that could be burglarized, and the offense is indivisible. *United States v. Haney*, 840 F.3d 472 (7th Cir. 2016). *Haney* suggested in dictum, however, that Illinois residential burglary might qualify as generic burglary. *Id*. at 476 n.2.

The district court acknowledged the force of Smith's argument, since it had been accepted by other Circuits regarding similar statutes. The district court further noted that the government had conceded in another case that the Illinois residential burglary statute did not represent generic burglary. A. 8. Nonetheless, the district court considered itself compelled by Circuit precedent to deny the motion. It issued a certificate of appealability.

Smith's appeal was orally argued on the same day with another case that raised the same issue, and the Seventh Circuit issued a single opinion that resolved both appeals.

The opinion below, consistent with the Seventh Circuit's earlier decision in *Haney*, accepted that Illinois residential burglary is an indivisible offense, and it turned its attention to whether Illinois residential burglary is generic. *Haney* had held that Illinois' general burglary statute was not generic, but the Seventh Circuit concluded that Illinois' residential burglary statute is generic. "We conclude that the crime of residential burglary in Illinois does not cover the entry of vehicles (including boats) and tents." 877 F.3d at 723. However, in the same breath, the Seventh Circuit significantly qualified this broad statement. Under Illinois law, trailers are undeniably considered vehicles, as the Seventh Circuit admitted. *Id.* See 625 ILCS 5/1-209; 625 ILCS 5/1–217. For that reason, the remainder of the Seventh Circuit's opinion considered at length whether a trailer, albeit a vehicle, can nonetheless be the object of a generic burglary.

The Seventh Circuit candidly acknowledged, 877 F.3d at 725, that this Court, most notably in *Shepard*, had pointed in the opposite direction, but it could not believe that this Court really intended cases like *Shepard* to have so broad a reach. It expressly rejected opinions from other Circuits that took their cue from *Shepard*. Instead, the Seventh Circuit embraced the dissent in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017), a decision on which the government is currently seeking certiorari.

REASONS FOR GRANTING THE PETITION

Illinois law makes it residential burglary to burglarize a trailer when the trailer is someone's dwelling place. 720 ILCS 5/19–3. Illinois law categorizes trailers as vehicles. 625 ILCS 5/1-209. Under this Court's precedents, burglary of a vehicle is not generic burglary. Given those premises, the result in Smith's case should have been obvious: Illinois residential burglary is not generic burglary. In fact, in one case, the government has already conceded that Illinois residential burglary is not generic, and the court granted relief. *Green v. United States*, 2017 WL 568315, at

*2 (E.D. Wis. Feb. 13, 2017). But the Seventh Circuit concluded that this Court did not specifically exclude generic burglary status for vehicles when the vehicle serves as someone's dwelling place. In reaching its result, the Seventh Circuit also rejected decisions in other Circuits that generic burglary does not extend to vehicles, not even when the vehicle serves as someone's dwelling.

Indeed, the government is currently seeking certiorari on this same issue in two of the cases rejected by the Seventh Circuit. *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017), and *United States v. Sims*, 854 F.3d 1037 (8th Cir. 2017). Like the government, Smith believes that this issue deserves this Court's attention. Smith disagrees, however, with the government on how to resolve this important issue.

I. The Seventh Circuit's decision conflicts with this Court's pronouncements that burglary of a vehicle is not generic burglary.

The Illinois residential burglary statute criminalizes burglary of a dwelling place, which is defined as "living quarters"

and can include named categories of places, like trailers. The Seventh Circuit's statement that the Illinois residential burglary statute does not extend to tents, mobile homes, vessels, or vehicles in general, and that these places are covered only by the general burglary statute, is highly questionable. People are known to have "living quarters" in these various locations. But the opinion below by no means charts a straight-line course.

In the same breath, the decision below acknowledges that under Illinois law trailers are indeed vehicles and are covered by the Illinois residential burglary statute. 877 F.3d at 723. Building on that foundation, the decision below holds that burglary of a trailer, that is, a vehicle, is generic burglary, notwithstanding this Court's precedents.

This Court, beginning with *Taylor v. United States*, 495 U.S. 575 (1990), has repeatedly declared that burglary of a vehicle is not generic burglary. The Seventh Circuit claims to have discovered an exception for vehicles that serve as dwelling places. That claimed exception is in reality a contradiction of this Court's precedents, and it widens a Circuit split.

ACCA enumerates "burglary" as a violent felony, but does not define burglary. An earlier version of the statute 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." Pub.L. 98–473, § 1802 (1984), repealed by Pub.L. 99–308, § 104(b) (1986).

In *Taylor v. United States*, 495 U.S. 575 (1990), this Court considered the meaning of burglary, which was left undefined in the 1986 version of the statute. After canvassing the legislative history of the 1986 revision, the Court concluded, "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. The Court could find "nothing in the history to show that Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different." *Id*. at 590. Although the Court recognized that omission of a pre-existing definition of a term often indicates

Congress' intent to reject that definition, "we draw no such inference here." *Id*.

Taylor did not, however, adopt a definition identical to the definition found in the 1984 version of the statute. Instead, it chose a definition it deemed "practically identical," 490 U.S. at 598, to the 1984 statutory definition. "Although the exact formulations vary, the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id*. On the next page, it declared burglary 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 explain why it added "other structure" or "structure" to the 1984 definition, and it did not seem to attribute any difference in meaning created by the word "other." Nor did it discuss how a "structure" might differ from a "building."

However, *Taylor* indicated that unlawful entry into an automobile is not the generic burglary required under ACCA. The government had argued that any conviction for an offense labeled burglary should satisfy ACCA's burglary clause. The Court rejected that approach, since burglary statutes in several states included unlawful entry into automobiles. 495 U.S. at 590-92. The Court would not countenance a burglary conviction based on unlawful entry into an automobile.

Taylor's exclusion of vehicles has special significance. The Court did not give extended consideration to the meaning of "structure," the term it paired with "building." A typical dictionary definition for "structure" is "a building or other object constructed from several parts." Concise Oxford English Dictionary 1423 (10th ed. rev. 2002). This definition of structure could possibly include vehicles, since they are undeniably objects constructed from several parts. But *Taylor's* pointed remarks about vehicles indicate that the Court did not consider vehicles to be structures as required for its definition of generic burglary.

In *Shepard v. United States*, 544 U.S. 13 (2005), the Court reiterated that vehicles are not buildings and cannot be the object of a generic burglary. "The Act [ACCA] makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle." 544 U.S. at 15-16. In *Shepard's* formulation, "enclosed space," not "structure," stands as the alternative to "building," but *Shepard* did not seem to attach any significance to this variation. Although a boat or a motor vehicle might, for some, represent an "enclosed space," *Shepard* emphasized that a boat or a vehicle would not satisfy the definition of generic burglary.

More recently, in *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Court considered an Iowa burglary statute, which all parties agreed covered more conduct than generic burglary, since it included any building, structure, or vehicle, including land, water, and air vehicles. *Id*. at 2250. Although *Mathis* concentrated on the divisibility of the statute, that inquiry rested on the premise that burglary of a vehicle is not generic burglary.

Id. at 2251, 2257. Once *Mathis* found the statute indivisible, the offense was doomed as an ACCA predicate.

Despite this unbroken line of precedent, the Seventh Circuit concluded that burglary of a vehicle counts as generic burglary if the vehicle is someone's dwelling. The Seventh Circuit reasoned that, if generic burglary excluded burglary of vehicles, then the definition of generic burglary would be "satisfied by no more than a handful of states—if by any." 877 F.3d at 724. The Seventh Circuit could not believe that this Court intended to make it so hard for a burglary statute to meet the Court's definition of generic burglary.

The decision below ignores a sound piece of advice from this Court. "But a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same . . ." *Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016). Since this Court has said that vehicles cannot be the object of generic burglary, a lower court should take this Court at its word. It should not assume that the Court had in mind an overriding goal

to validate as ACCA predicates as many burglary convictions as possible.

Moreover, the opinion below provided no support for the broad assessment that few, if any, state burglary statutes would qualify as generic burglary if *Taylor* were seriously taken. Perhaps the Seventh Circuit was relying on a similar statement by the dissent in *Stitt*. 860 F.3d at 880. But the *Stitt* dissent is equally conclusory, providing no more than an unadorned citation to an appendix to the government's brief in *Stitt*.

The government's certiorari petition in *Stitt*, currently pending, provides a similar, if not identical, appendix, which Smith reproduces in his appendix to his petition. The *Stitt* appendix provides no basis for concluding that few, if any, burglary crimes would qualify as generic. The *Stitt* appendix collects the burglary statutes in force when the 1986 version of ACCA was enacted. The *Stitt* appendix further provides for each state's burglary statute a brief summary of what the government believes are the statute's key terms. Notably, many of these statutes include vehicles as places that can be burglarized. But

the *Stitt* appendix contains no information as to whether these statutes are divisible. This would be critical information. If a statute is divisible, then some portion might be generic and capable of producing a viable ACCA predicate, as *Mathis* teaches.

For example, the entry in the *Stitt* appendix for Missouri's burglary statute describes it as applying to a "building," as well as to an "inhabitable structure," the latter including land, water, and air vehicles. Under *Shepard*, a burglary of an inhabitable structure so broadly defined would not count. However, the Missouri statute also includes buildings, which do count. Indeed, the Eighth Circuit has declared that this statute is divisible under the test laid down by this Court in *Mathis*, and that the provision regarding buildings creates a generic burglary. *United States v. Sykes*, 844 F.3d 712 (8th Cir. 2016), No. 16-9604. The government is currently opposing certiorari in *Sykes* on the ground that the Missouri statute was correctly found to be divisible and that Sykes had a conviction for generic burglary, that is, burglary of a building. Smith does not take a position on whether *Sykes* was correctly decided. He merely notes that the

Stitt appendix provides no information that would be needed to support the Seventh Circuit's sweeping assessment.

To take another example, the *Stitt* appendix describes the New Mexico burglary statute, N. M. S. A. 1978, § 30-16-3, as applying to "any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable." But that brief quotation from the initial portion of the statute omits reference to the statute's following two subdivisions, one of which applies only to a "dwelling house," and makes the statute divisible. *United States v. Turrieta*, 875 F.3d 1340 (10th Cir. 2017) (in New Mexico burglary of a dwelling house is generic burglary).

Other examples are readily at hand. *E.g., United States v. Lamb*, 847 F.3d 928 (8th Cir. 2017), on remand from *Lamb v. United States*, 137 S. Ct. 494 (2016), currently pending before this Court as No. 17-5152, involving Wisconsin burglary; *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016) (Georgia burglary). Perhaps further digging may unearth other examples.

Moreover, it is entirely possible that, for various states, the law is unsettled about the divisibility of its burglary statute. To

the extent that the law is unsettled in various jurisdictions, the *Stitt* appendix provides no basis for the Seventh Circuit's conclusory statement that Smith's reading of this Court's cases would leave little room for generic burglary.

Finally, an argument that relies on the *Stitt* appendix proves too much and thereby reveals its defect. If the *Stitt* appendix demonstrates that almost no state has a generic residential burglary statute, it also demonstrates that almost no state has a generic burglary statute of any kind, and that *Taylor* erred in excluding vehicles from its definition of generic burglary. Tellingly, the government does not press the argument that *Taylor's* definition of generic burglary must be rejected for both residential burglary and for non-residential burglary.

The Seventh Circuit also reasoned that its approach is more consistent with the Model Penal Code's burglary provision and, therefore, consistent with *Taylor*, which spoke favorably of the MPC. 877 F.3d at 724-25. Without a doubt, the Seventh Circuit rule is consistent with the MPC. Section 221.0(1) of the MPC, defining "occupied structure," expressly includes vehicles

as the object of burglary. *Taylor* was fully aware of that coverage, but *Taylor* chose a different formulation, omitting from its formulation the word "occupied." That omission was a conscious choice, since *Taylor* expressly noted that vehicles would not fit its definition of generic burglary. 495 U.S. at 602. This Court's later decisions, like *Shepard*, have reiterated that generic burglary does not include vehicle burglary.

The Seventh Circuit's opinion also advances the argument that *Taylor* (and later cases from this Court) did not actually consider burglary of dwellings and, hence, this Court's cases leave open the possibility that residential burglary is always generic burglary, even when the dwelling is a vehicle. 877 F.3d at 725. But *Taylor*, it can be said without contradiction, fully considered the role of dwellings in burglary law. *Taylor* specifically noted the common law's restriction to dwellings. *Taylor* recognized that the burglary statutes of many states had broadened dwelling beyond its common law meaning or had altogether dispensed with dwelling as an element. 495 U.S. at 592-93. *Taylor* then rejected dwelling as an element of generic

burglary. There is no basis to suppose that when *Taylor* rejected "dwelling" for a more inclusive term like "building or other structure," it silently reserved dwelling as a category that could include vehicles. As noted above, *Taylor* stressed that vehicles were not included in its definition of generic burglary.

II. The Seventh Circuit's reading of generic burglary widens a Circuit split.

As the decision below acknowledged, the Seventh Circuit has rejected decisions from other Circuits on this issue. Indeed, it has chosen to align itself with the dissent in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017), a decision on which the government is currently seeking certiorari. (The government is also seeking certiorari on this same issue in *United States v. Sims*, 854 F.3d 1037 (8th Cir. 2017).)

Various Circuits have correctly ruled that when a indivisible burglary statute includes vehicles, the burglary offense is not generic burglary. This conclusion does not change merely because the vehicle is someone's dwelling or habitation. *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017); *United States*

v. Sims, 854 F.3d 1037 (8th Cir. 2017); *United States v. White*, 836 F.3d 437 (4th Cir. 2016); *United States v. Cisneros*, 826 F.3d 1190 1194 (9th Cir. 2016); *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016)

The Seventh Circuit could point to only the Tenth Circuit as taking a contrary view. *United States v. Spring*, 80 F.3d 1450, 1462-63 (10th Cir. 1996) (Texas burglary is generic even though it allows conviction for entry into a vehicle). It also noted that the Fifth Circuit had been in agreement, *United States v. Herrold*, 685 Fed. Appx 302 (5th Cir. 2017), remanded by *Herrold v. United States*, 137 S. Ct. 310 (2016), but had granted rehearing en banc. *United States v. Herrold*, 693 Fed. Appx. 272 (5th Cir. 2017). As of Smith's filing today, *Herrold* remains undecided.

III. The issue presented has importance for a broad class of cases, and Smith's case provides a good vehicle for its resolution.

The issue raised by Smith is an important one deserving this Court's attention, as the government's petitions in *Stitt* and *Sims* agree. This issue has produced a clear and identifiable

Circuit split that only this Court can resolve. This split results in significant consequences. Numerous defendants in the Seventh Circuit have been subjected to ACCA sentences as a result of residential burglary convictions, and many more will face that prospect over the years.

For defendants in other Circuits, convictions under essentially identical residential burglary statutes do not lead to ACCA sentences. Indeed, defendants in these other Circuits may avoid ACCA sentences even though they have an Illinois residential burglary conviction.

Smith also submits that his case presents a better vehicle than Stitt's case for the resolution of this important issue. In *Stitt*, the government has vacillated on whether the Tennessee burglary statute is indivisible. At first, it argued that the statute was divisible. Then, after *Mathis*, it took the opposite position, although it acknowledged that the question was not free from doubt. Gov't Sup. Br., *United States v. Stitt*, 2016 WL 4539607, at *23-24 (6th Cir. Aug. 29, 2016). Although the Sixth Circuit premised its ruling on the finding that the Tennessee statute is

divisible, 860 F.3d at 862, that holding is not binding on this Court.

And this Court might have good reason to question whether the Tennessee burglary statute is divisible. Under T.C.A. § 39-14-403, aggravated burglary is burglary of a habitation as defined in T.C.A. §§ 39-14-401 and 39-14-402. Although section 39-14-401 defines habitation broadly to include vehicles, subsections (2) and (3) of section 39-14-402 would limit the offense to habitations that are buildings. Thus, Tennessee aggravated burglary may be divisible into burglary of buildings and burglary of non-buildings. If this Court were to find Tennessee burglary divisible, and if Stitt was convicted under one of the building sections of the statute (which is not clear from the *Stitt* opinion), then this Court would have no reason to resolve whether burglary of a vehicle is generic burglary.

In Smith's case, by contrast, the Illinois residential burglary statute has a more straightforward framework, and the government has never disputed that the Illinois statute is indivisible. The Illinois residential burglary statute covers all

dwelling places, as is reflected in the Illinois pattern jury instructions. IPI (Criminal) § 14.13. In Smith's case, the Court can proceed directly to the issue tendered for review.

CONCLUSION

Wherefore, it is respectfully requested that this Court grant a writ of certiorari to review the decision below.

Dated January 17, 2018, at Chicago, Illinois.

Respectfully submitted,

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